

AN
AUTHENTIC ACCOUNT
OF THE
T R I A L S

AT LARGE, OF *Brown (p. 7.)*
GEORGE ROBERT FITZGERALD, Esq;
TIMOTHY BRECKNOCK, JAMES FULTON,
AND OTHERS,

FOR THE PROCUREMENT OF, AND FOR THE
M U R D E R
OF
PATRICK RANDALL M'DONNELL
AND CHARLES HIPSON.

A L S O

The TRIAL of JOHN GALLAGHER and OTHERS, for
an ASSAULT on GEORGE ROBERT FITZGERALD, in
the Gaol of Castlebar.

The SPEECH of GEORGE ROBERT FITZGERALD, Esq;
previous to his receiving Sentence—the ARGUMENTS of
COUNCIL—the Lord Chief Baron YELVERTON'S SPEECH
on passing their Sentences—the whole PROCEEDINGS of
the COURT—together with a DESCRIPTION of their
CONDUCT at the Place of Execution.

L O N D O N :

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THE ACCOUNT

OF THE

REVENUE

AT LONDON

FOR THE YEAR 1839

BY

WILLIAM R. L. M. D. R.

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THE ACCOUNT OF THE REVENUE OF THE UNITED KINGDOM FOR THE YEAR 1839



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LONDON

PRINTED BY J. JOHNSON, ST. PAUL'S CHURCH-YARD

1840

WILLIAM GARROW, Esq.

OF LINCOLN'S INN,

BARRISTER AT LAW.

MY DEAR SIR,

WHEN in pursuit of our present profession, our habits and attentions were so similar, that, I flatter myself, I am not entirely forgotten by you. Lest, however, the change of country, the remoteness of situation, and the avocations of business, may have estranged me from your memory, I have taken the liberty of inscribing to you a Note of a Trial, which at present occupies much public attention here, not only from the extraordinary character of the person tried,

tried, but from some points of law which were agitated upon that occasion. If it shall recal to your recollection some of these many hours which we have devoted together to literary entertainment, or learned amusements, it will amply compensate any trouble I have experienced on this occasion.

I have the honour to be,

DEAR SIR,

your obliged and obedient

Friend and Servant,

GEO. JOS. BROWNE.

DUBLIN, JUNE 22, 1786.

PROCEEDINGS, &c.

ASSIZES AT CASTLEBAR.

MONDAY, APRIL 10, 1786.

THE Lord Chief Baron Yelverton, and Mr. Baron Power, after reading their commission, adjourned to the next day.

TUESDAY, APRIL 11, 1786.

The following Grand Jury were sworn :

Sir Neal O'Donnell, Bart. Foreman.

Right Honourable James Cusse,

Honourable Henry Browne,

Thomas S. Lindsay, Esq;

Charles Costello, Esq;

John Bingham, Esq;

Thomas Lindsay, senior, Esq;

Thomas Lindsay, junior, Esq;

Francis Knox, Esq;

Arthur French, Esq;

George Miller, Esq;

Christopher Bowen, Esq;

William Rutledge, Esq;

Hugh O'Donnell, Esq;

James Browne, Esq;

Thomas Ormsby, Esq;

John Ormsby, Esq;

A

Richard

Richard Blake, Esq;
 Edward Browne, Esq;
 William Brabazon, Esq;
 George O'Maley, Esq;
 William Oram, Esq;
 James O'Donnell, Esq;

After the Chief Baron had given his charge, Mr. Stanley then moved the Court for liberty to admit Counsel, and his Agents to Mr. Fitzgerald. He stated, that since the revolution there had not been an example of such severity as had been practiced towards Mr. Fitzgerald since his commitment; that in the case of the assassins, in the reign of King William, it had not been so; and also in the case of Lord Winton and Lord Lovat, though committed for high treason against the state, all the prisoners, through the benignity of the times, were allowed counsel to attend them in prison previous to their trials. He cited many other cases.

The Chief Baron interrupted him, saying, there is no occasion to make any parade about it; if there had been a private application to the Attorney General, who was then in his eye, he did not doubt but every reasonable indulgence would be given to him.

The Attorney General then said, that he understood every thing which was consistent with the safe keeping of Mr. Fitzgerald had been, and would continue to be done.

The Hon. Dennis Browne, High Sheriff, begged leave to say a few words. He had been obliged to order Mr. Fitzgerald under close confinement, from attempts made by himself—he had endeavoured to bribe the Sub-sheriff to permit him to escape.

escape. He was going to state other matters, but was interrupted by the *Chief Baron*, who said, that stating such facts might tend to prejudice the minds of men who might, perhaps, be on the Petit Jury that were to try Mr. Fitzgerald.

Mr. O'Farrell then moved, that Mr. T. Burgess might be admitted to Mr. Fitzgerald. He stated, that he was a person absolutely necessary to him, for pecuniary purposes.

The High Sheriff said, he did not think it prudent to admit him to Mr. Fitzgerald. However, after some argument, the Chief Baron was pleased to order that Mr. Burgess should be admitted, all necessary precautions being taken; also his Agent, Mr. John Lynott, and one or two of his Counsel, who are Mr. Ferrall, Mr. Stanley, and Mr. Owen.

The *Chief Baron* ordered the several persons charged with murder to be brought up to-morrow, in order to their arraignment.

The Court then proceeded to the ordinary business, after which they adjourned to the next day.

WEDNESDAY, APRIL 12, 1786.

The several persons charged with murder were brought up to be arraigned.

As soon as the Judge had taken his seat, Mr. Brecknock stated to the Court that he was weak and infirm through age, and applied to be let within the bar, that he might sit. The Chief Baron told him, he could not comply with his request, but that a chair should be provided for him, that he might sit in the dock.

Mr. Stanley said, that counsel on behalf of Mr. Fitzgerald had a motion to submit to Court, and Mr. O'Farrel went on to lay the ill state of Mr. Fitzgerald's health before his Lordship, and his having been plundered by a mob, after the unhappy accident.

The *Attorney General* said, that he supposed this was to be a second edition of the application of yesterday.

Mr. Stanley replied, it was not; and said, tho' his client was not able to procure an affidavit from a physician, that his health was so precarious--- or from a surgeon, that his state was so uncertain that he could not attend, and tho' he could not himself in truth make such an affidavit, yet he trusted to be able to lay before the Court such an affidavit, as to his state of his mind, as to induce his Lordship to postpone his trial. He also said he had an application to make to his Lordship's humanity, which was, to request his Lordship to go down to the gaol to take his affidavit, as from the treatment Mr. Fitzgerald had received, he had been confined to his bed, and could not come to the court in any other manner, and he believed it was a frequent practice for Judges to go to the gaol of Newgate, in Dublin, for similar purposes, and hoped his Lordship would so far favour his client.

The *Attorney General* asked Mr. Stanley, if he meant to put off the trial before Mr. Fitzgerald had pleaded?

The *Chief Baron* asked, was there any affidavit that Mr. Fitzgerald's state of health was such that he could not with safety come into court to be arraigned?

Mr.

Mr. O'Farrell begged five minutes time to consult with Mr. Fitzgerald, whether he could make such an affidavit, which being granted, his counsel went to him, and after a stay of about a quarter of an hour returned.

Mr. Ulick Burke then stated, that with safety to his life, Mr. Fitzgerald could not come into court.

The Chief Baron asked, if Mr. Fitzgerald had been visited by any person of medical skill?

Mr. Owen declared that Mr. Fitzgerald still languished under injuries received, while in the custody of the law, from the most savage and brutal barbarity, and hoped his Lordship would take the affidavit.

Mr. Ulick Burke alledged, that Mr. Fitzgerald laboured under extreme illness, and that a violent rash on his skin made it unsafe for him to leave his bed.

Mr. Stanley then stated an affidavit, which Mr. Fitzgerald proposed to make to put off his trial, in which it was alledged that his state of health was such as not to be able to take his trial at the present assizes.

The Attorney General observed, that it had been stated by counsel that Mr. Fitzgerald could not make such an affidavit as was now proposed, but so soon as his counsel were admitted to him, the very affidavit which he could not make, was now to be prepared.

The Chief Baron agreed with the Attorney General, that the facts were certainly so.

Mr.

Mr. Stanley, to exculpate himself, said, that he had no previous consultation with Mr. Fitzgerald, and had misconceived his state of health.

The *Chief Baron* informed him, that no person accused him of improper conduct; and it being suggested by a gentleman in court, that Dr. Boyd, the physician who had attended Mr. Fitzgerald, was then in court, the *Chief Baron* directed him to visit Mr. Fitzgerald, and report his state of health; and the Court adjourned for half an hour.

The court being again opened, Dr. Boyd, on the suggestions of Mr. M'Carty, one of Mr. Fitzgerald's counsel, was sworn. He declared that Mr. Fitzgerald might be brought up warmly covered, or in his bed, as he alledged that he had no cloaths; that his long lying in a horizontal posture had made it, perhaps, less safe for him to come in any other manner; and that contrary to all patients he had known, who generally desired to leave their beds, he could not prevail upon Mr. Fitzgerald to quit his, nor could he induce him to take animal food, which would have speedily amended the injuries he had sustained by loss of blood.

The *Chief Baron* ordered him to be brought up, with proper precautions, in his bed.

Mr. M'Carty then asked Dr. Boyd, if there was not a rash on Mr. Fitzgerald? to which the Doctor answered in the affirmative, but that it was not dangerous.

The Court then adjourned for half an hour, after which adjournment Mr. Fitzgerald was brought into Court in his bed, and laid on the witness's table, where he, together with Timothy Brecknock, &c.

&c. &c. were arraigned on the following indictment:

County of Mayo, } THE Jurors for our Lord the
to wit. } King, upon their oath, present
and say, That George Robert
Fitzgerald, late of Rockfield, in the county of
Mayo, Esq; Timothy Brecknock, late of the same,
Gent. John Fulton, late of the same, weaver,
Charles King, late of the same, yeoman, John
King, late of the same, yeoman, Abel Fulton, late
of the same, yeoman, John Murphy, late of the
same, yeoman, James Masterfon, late of the same,
yeoman, John Cox, late of the same, yeoman,
David Saltry, late of the same, yeoman, Philip
Cox, late of the same, yeoman, Richy Law, late
of the same, yeoman, John Huston, late of the
same yeoman, James Foy, otherwise Sladeen,
late of the same, yeoman, William Fulton, late
of the same, yeoman, and Samuel Stephenson,
late of the same, yeoman, with divers other per-
sons, to the Jurors aforesaid at present unknown,
not having the fear of God before their eyes, but
being moved and seduced by the instigation of the
Devil, on the 21st day of February, in the 26th
year of the reign of our sovereign Lord George the
Third, of Great-Britain, France and Ireland, king,
defender of the faith, and so forth, with force and
arms, at Gurtnefullagh, aforesaid, in the county
aforesaid, in and upon one Charles Hipson in the
peace of God, and a subject of our said Lord the
King within this land of Ireland, then and there
being wilfully, traiterously, feloniously, and of
their malice prepensed, did make an assault; and
that the said John Fulton a certain gun of the value
of 5 s. then and there charged with gun-powder
and one leaden bullet, which gun he the said John
Fulton in his right-hand then and there had and
held against, and upon the said Charles Hipson then
and

and there wilfully, traiterously, feloniously, and of his malice prepensed, did shoot and discharge, and that he the said John Fulton with the leaden bullet aforesaid out of the gun aforesaid, then and there by force of the gun-powder aforesaid, shot and sent forth as aforesaid the aforesaid Charles Hipson in and upon *the left side of him the said Charles Hipson, a little under the left arm of him* the said Charles Hipson, then and there with the leaden bullet aforesaid, out of the gun aforesaid, by the said John Fulton so as aforesaid, shot, discharged and sent forth, wilfully, traiterously, and of his malice prepensed, did strike, penetrate and wound, giving to the said Charles Hipson then and therewith the leaden bullet aforesaid so as aforesaid shot, discharged and sent forth out of the gun aforesaid, by the said John Fulton, in and upon *the said left side of him the said Charles Hipson, a little under the left arm of him* the said Charles Hipson, one mortal wound of the depth of four inches, and of the breadth of half an inch; of which said mortal wound the aforesaid Charles Hipson then and there instantly died. And that the aforesaid George Robert Fitzgerald, Timothy Brecknock, Charles King, John King, Abel Fulton, John Murphy, James Masteron, John Cox, David Saltry, Philip Cox, Richy Law, John Huston, James Foy, otherwise Sladeen, William Fulton, and Samuel Stephenson, then and there wilfully, traiterously, and of their malice prepensed, were present, aiding, helping, abetting, comforting, assisting, and maintaining the said John Fulton in the treason and murder aforesaid, in manner and form aforesaid to do and commit. And so the Jurors aforesaid do say, that the said George Robert Fitzgerald, Timothy Brecknock, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Masteron, John Cox, David Saltry, Philip Cox, Richy

Richy Law, John Huston, James Foy, otherwise Sladeen, William Fulton, and Samuel Stephenson, the said Charles Hipson then and there in manner and form aforesaid, wilfully, traiterously, feloniously and of their malice perpended, did flee and murder, against the peace of our said Lord the King, his crown and dignity, and against the form of the statute in such case made and provided.

They were then also arraigned on the following indictment :

County of Mayo,
to wit.

} The Jurors for our Lord the
King, upon their oath, present
and say, That George Robert
Fitzgerald, late of Rockfield, in the county of
Mayo, Gent. Timothy Brecknock, late of the
same, Andrew Creagh, otherwise Craig, late of
the same, yeoman, James Foy, late of the same,
yeoman, John Fulton, late of the same, weaver,
Charles King, late of the same, yeoman, John
King, late of the same, yeoman, Abel Fulton, late
of the same, yeoman, John Murphy, late of the
same, yeoman, James Masterfon, late of the same,
yeoman, John Cox, late of the same, yeoman, Da-
vid Saltry, otherwise Simpson, late of the same,
yeoman, Philip Cox, late of the same, yeoman,
Richy Law, late of the same, yeoman, John Hus-
ton, late of the same, yeoman, James Foy, other-
wise Sladeen, late of the same, yeoman, William
Fulton, late of the same, yeoman, Samuel Stephen-
son, late of the same, yeoman, John M'Mullen,
late of the same, yeoman, William Kelly, late of
the same, yeoman, William and Robert Logan, late
of the same, yeomen, Wallace Kelly, late of the
same, yeoman, James M'Cullagh, late of the same,
yeoman, John Chambers, late of the same yeo-
man,

man, John Chapman, late of the same, yeoman, Archibald Newen, late of the same, yeoman, John Bernee, late of the same, yeoman, Humphry George, late of the same, yeoman, Michael Brewing, late of the same yeoman, John Rehenny, late of the same, yeoman, William Robinson, late of the same, yeoman, Patrick Dorning, otherwise Downey, late of the same, yeoman, with divers other persons, to the Jurors at present unknown, not having the fear of God before their eyes, but being moved and seduced by the instigation of the Devil, on the twenty-first day of February, in the twenty-sixth year of the reign of our Sovereign Lord George the Third, now King of Great Britain, France and Ireland, defender of the faith, and so forth, with force of arms, at Kilnecarra, in the county aforesaid, in and upon Patrick Randall M'Donnell in the peace of God and a subject of our Lord the King, within this land of Ireland, then and there being wilfully, traitorously, and of their malice prepensed, did make an assault, and that the said Andrew Craig a certain pistol of the value of five shillings then and there charged with gun-powder and one leaden bullet, which pistol he the said Andrew Craig in his right-hand then and there had and held against, and upon the said Patrick Randall Mc.Donnell then and there wilfully, traitorously, and of his malice prepensed, did shoot and discharge, and that the said Andrew Craig with the leaden bullet aforesaid out of the pistol aforesaid, then and there by force of the gun-powder aforesaid shot and send forth as aforesaid, the aforesaid Patrick Randall Mc.Donnell in and upon the left breast of him the said Patrick Randall Mc.Donnell then and there with the leaden bullet aforesaid out of the pistol aforesaid, by the said Andrew Craig as aforesaid shot, discharged and sent forth wil-

wilfully, traitorously and of his malice prepensed, did strike, penetrate and wound, giving to the said Patrick Randall Mc.Donnell then and there with the leaden bullet aforesaid so as aforesaid shot, discharged and sent forth out of the pistol aforesaid by the said Andrew Craig, in and upon the said left breast of him the said Patrick Randall Mc.Donnell one mortal wound of the depth of four inches, and of the breadth of half an inch, of which said mortal wound the aforesaid Patrick Randall Mc.Donnell then and there instantly died; and that the aforesaid George Robert Fitzgerald, Timothy Brecknock, James Foy, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Masterfon, John Cox, David Saltry, Philip Cox, Richy Law, John Huston, James Foy, otherwise Sladeen, William Fulton, Samuel Stephenson, John Mc.Mullen, William Kelly, Patrick Dorning, William Logan, Robert Logan, William Fulton, Wallace Kelly, James Mc.Cullagh, John Chambers, John Chapman, Archibald Newen, and John Bernee, then and there wilfully, traitorously, and of their malice prepensed, were present, aiding, helping, abetting, comforting, assisting and maintaining the said Andrew Craig in the treason and murder aforesaid, in manner and form aforesaid to do and commit. And so the Jurors aforesaid do say, that the said Andrew Craig, George Robert Fitzgerald, Timothy Brecknock, James Foy, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Masterfon, John Cox, David Saltry, Philip Cox, Richy Law, John Huston, James Foy, otherwise Sladeen, William Fulton, Samuel Stephenson, John Mc.Mullen, William Kelly, Patrick Dorning, William Logan, Robert Logan, William Fulton, John Chambers, John Chapman, Archi-

bald Newen, and John Bernee, the said Patrick Randall Mc.Donnell, then and there in manner and form aforesaid, wilfully, traitorously, and of their malice prepensed, did flee and murder, against the peace of our said lord the king, his crown and dignity, and also against the form of the statute in such case made and provided.

When Mr. Brecknock was called to plead, he said there did not appear to be any *constat* of a true bill against him; that in that case the presumption of law was, that the bill was *ignored*; and claimed as his right to have a fight of the true bill.

The *Chief Baron* directed the Clerk of the Crown to go on with his duty; and the bill ending, "against the form of the statute," Mr. Brecknock asked what statute? To which the Court answered, that he was now premature.

When the question, "how will you be tried," was put to him, and the Clerk of the Crown desired him, as usual, to answer, "by God and my Country," Mr. Brecknock said, I should choose to be tried by God, and not by *your* Country. After being repeatedly urged to plead in the common form,

The *Chief Baron* informed him, that if he did not answer in the manner prescribed, he must proceed according to law, which would be to consider him as *mute*, and pass sentence upon him.

Mr. Brecknock said it was impossible to be tried both by God and the Country, they were distinct propositions. But being again urged by the *Chief Baron*, he made the usual answer, and then they all severally pleaded, Not Guilty, to both indictments.

George

George Robert Fitzgerald and Timothy Brecknock were then arraigned on the following indictment :

County of Mayo, } The Jurors of our Lord the
to wit. } King upon their oath present

and say, That George Robert Fitzgerald, late of Rockfield, in the county of Mayo, Esq; and Timothy Brecknock, late of the same, Gent. not having the fear of God before their eyes, but being moved and seduced by the instigation of the Devil, on the 21st day of February, in the 26th year of the reign of our Sovereign Lord George the Third now King of Great Britain, France, and Ireland, defender of the faith, and so forth, at Rockfield aforesaid, in the said county of Mayo, did of their malice prepensed, wilfully, traitorously, and feloniously provoke, stir up, and procure Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons, at present to the Jurors aforesaid unknown, to sleet and murder one Patrick Randall McDonnell, who was then and there a subject of our said Lord the King, within this land of Ireland.

And the Jurors aforesaid, upon their oath aforesaid, further present and say, that the said Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Renanny, John Burney,
William

William Robinson, John Cox, Philip Cox, James Masterfon, Patrick Dorning, otherwise Downey, and divers other persons, at present to the Jurors aforesaid unknown, on the day aforesaid, in the year aforesaid, with force and arms, to wit, at Kilnecarra in the county aforesaid, in and upon the said Patrick Randell Mc.Donnell, in the peace of God, and of our said Lord the King, then and there being wilfully, traitorously, and feloniously, and of their malice prepensed, did make an assault, and certain guns of the value of 5s. each and every of the said guns, being then and there charged with gunpowder and a leaden bullet, which guns they the said Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, in their right hands respectively, then and there had and held against and upon the said Patrick Randall Mc.Donnell, wilfully, traitorously, and feloniously, and of their malice prepensed, and by the aforesaid provocation, stirring up and procurement of the said George Robert Fitzgerald, and Timothy Brecknock, did shoot and discharge, and the said Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, with the leaden bullets aforesaid out of the guns aforesaid, then and there by force of the gunpowder

gunpowder aforesaid, shot and sent forth as aforesaid, the aforesaid Patrick Randall Mc.Donnell wilfully, traitorously, and feloniously and of their malice prepensed, and by the aforesaid provocation, stirring up and procurement of the said George Robert Fitzgerald, and Timothy Brecknock, then and there did strike, penetrate, and wound, giving to the said Patrick Randall Mc.Donnell, then and there with the leaden bullets aforesaid, so as aforesaid, shot, discharged, and sent forth out of the guns aforesaid by the said Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinson, John Cox, Philip Cox, James Masteron, and Patrick Dorning, otherwise Downey, in and upon the body of him the said Patrick Randall Mc.Donnell, several mortal wounds of the depth of four inches, and of the breadth of half an inch, and of which mortal wounds the aforesaid Patrick Randall Mc.Donnell then and there instantly died.

And the Jurors aforesaid, upon their oath aforesaid, do say, that Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinson, John Cox, Philip Cox, James Masteron, and Patrick Dorning, otherwise Downey, the said Patrick Randall Mc.Donnell, then and there in manner and form aforesaid, wilfully, traitorously, and feloniously, and of their malice prepensed, did flee and murder,

And

And so the Jurors aforesaid, upon their oath aforesaid, do say, that the said George Robert Fitzgerald, and Timothy Brecknock, then and there in manner and form aforesaid, wilfully, traitorously and feloniously, and of their malice pre-pensed, did provoke, stir up, and procure the said Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present to the Jurors aforesaid unknown, to flee and murder in manner and form aforesaid, the said Patrick Randall Mc.Donnell, then and there being a subject of our said Lord the King, within this land of Ireland, contrary to the peace of our said Lord the King, his Crown and dignity, and against the form of the statute in that case made and provided.

Mr. Stanley requested the former indictment to be read, as the charge now made, seemed to him to be for the same crime laid in the former indictment, and bid Mr. Fitzgerald not plead.

The Chief Baron then desired Mr. Stanley to plead or demur; and

The Attorney General asked him, did he choose to demur to the indictment? if he did, he would join him in the demurrer *instanter*.

Mr. Stanley then said, that in his opinion the present indictment was substantially for the same fact laid in the former indictment, to which Mr. Fitzgerald had pleaded not guilty, and said he thought it

it very hard, he should now be forced to plead not guilty to the second indictment; for if he should be acquitted on the first indictment, and that he should be advised to plead *autrefois acquit* to the second, he might be then told he came too late with that plea, having already pleaded the general issue not guilty, and as it had been determined in the case of the King against Swan and Jeffreys in Forster, that *autrefois arraign* was no plea. He did not see any possible way for the prisoner to take advantage of the objection now, but by way of demurrer.—However upon consideration and consultation, he gave it up, and advised Mr. Fitzgerald to plead, which he did, as did Mr. Brecknock.

They were then also arraigned on the following indictment:

County of Mayo, } THE Jurors of our Lord the
to wit. } King upon their oath present
and say, That George Robert Fitzgerald, late of
Rockfield, in the county of Mayo, Esq; and
Timothy Brecknock, late of the same, Gent. not
having the fear of God before their eyes, but
being moved and seduced by the instigation of the
Devil, on the 21st day of February, in the 26th
year of the reign of our Sovereign Lord George
the Third, now King of Great Britain, France, and
Ireland, defender of the faith, and so forth, at
Rockfield aforesaid, in the said county of Mayo,
did of their malice prepened, wilfully, traitor-
ously, and feloniously provoke, stir up, and pro-
cure Andrew Creagh, otherwise Craig, James Foy,
otherwise Slateen, Humphrey George, William
Kelly, John Fulton, William Fulton, David Simp-
son, otherwise Saltry, Archibald Newing, Michael
Brewing, John Chapman, John Rehanny, John
C Burney,

Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons, at present to the Jurors aforesaid unknown, to flee and murder one Charles Hipson, who was then and there a subject of our said Lord the King, within this land of Ireland.

And the Jurors aforesaid, upon their oath aforesaid, further present and say, that the said Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, Patrick Dorning, otherwise Downey, and divers other persons, at present to the Jurors aforesaid unknown, on the day aforesaid, in the year aforesaid, with force and arms, to wit, at Gurtnefulla, in the county aforesaid, in and upon the said Charles Hipson, in the peace of God, and of our said Lord the King, then and there being wilfully, traitorously, and feloniously, and of their malice prepensed, did make an assault, and certain guns of the value of 5s. each and every of the said guns, being then and there charged with gunpowder and leaden bullets, which guns they the said Andrew Creagh, [otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, in their right hands respectively, then and there had and held against and upon the said Charles Hipson, wilfully, traitor-

traitorously, and feloniously, and of their malice prepensed, and by the aforesaid provocation, stirring up and procurement of the said George Robert Fitzgerald and Timothy Brecknock, did shoot and discharge, and the said Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, with the leaden bullets aforesaid out of the guns aforesaid, then and there by force of the gunpowder aforesaid, shot and sent forth as aforesaid, the aforesaid Charles Hipson, wilfully, traitorously, and feloniously, and of their malice prepensed, and by the aforesaid provocation, stirring up and procurement of the said George Robert Fitzgerald and Timothy Brecknock, then and there did strike, penetrate, and wound, giving to the said Charles Hipson, then and there with the leaden bullets aforesaid, so as aforesaid, shot, discharged, and sent forth out of the guns aforesaid by the said Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, in and upon the body of him the said Charles Hipson, several mortal wounds of the depth of four inches, and of the breadth of half an inch, and of which mortal wounds the aforesaid Charles Hipson then and there instantly died.

And the Jurors aforesaid, upon their oath aforesaid, do say, that Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinson, John Cox, Philip Cox, James Masterion, and Patrick Dorning, otherwise Downey, the said Charles Hipson, then and there in manner and form aforesaid, wilfully, traitorously, and feloniously, and of their malice prepensed, did see and murder.

And so the Jurors aforesaid, upon their oath aforesaid, do say, that the said George Robert Fitzgerald, and Timothy Brecknock then and there in manner and form aforesaid, wilfully, traitorously, and feloniously, and of their malice prepensed, did provoke, stir up, and procure the said Andrew Creagh, otherwise Craig, James Foy, otherwise Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinson, John Cox, Philip Cox, James Masterman, and Patrick Dorning, otherwise Downey, and divers other persons at present to the Jurors aforesaid unknown, to see and murder in manner and form aforesaid, the said Charles Hipson, then and there being a subject of our said Lord the King, within this land of Ireland, contrary to the peace of our said Lord the King, his crown and dignity, and against the form of the statute in that case made and provided.

Mr.

Mr. Stanley then moved to put off the trial, and produced an affidavit of Mr. Fitzgerald's for the purpose of postponing his trial; which from inability was signed with his mark. It stated Mr. Fitzgerald's having been arrested on the 21st February, his tenantry banished, and his being himself attacked in prison; it also stated the absence of four material witnesses, which were spirited away by the prosecutor, and the temper of the county, which rendered it impossible, with safety to his life, to abide his trial until the next assizes.

The *Attorney General* then moved, that two affidavits which he held in his hand might be read; which was ordered.—They were the affidavit of Andrew Edmondson, which proved notice of trial being served on Mr. Fitzgerald; the other was the affidavit of Patrick Clarke, Sub-sheriff of the county, the purport of which was, that Mr. Fitzgerald, on the night of the day on which he was committed, had told him that he should be properly rewarded if he would let him escape.

The *Attorney General* said it was not his desire to press on the trial, but he wished to inform him, Mr. Fitzgerald, that his trial would certainly come on long before the next assizes.

The *Chief Baron* said, from the state in which he saw Mr. Fitzgerald, he had a judicial knowledge of his situation, and in a state, he thought a man of so much consequence ought to be perfectly at ease; the irons are to be stricken off from a prisoner who is to be tried—Why? that he may be in full possession of himself. Another part of his affidavit he feared was but too true, that the county was not in such a temper as to be fit for his trial.—Human nature will be human nature still; and

and where *crimes* like these are perpetrated, it is impossible not to feel resentment---And he was fortified in his opinion when he considered that the prisoner, even when in a gaol, in the custody of the law, was not secure from violence---but he thought it very right in the Attorney-General to acquaint Mr. Fitzgerald, that he must be speedily tried; the public tranquillity could not remain disturbed, and it was probable that he and Mr. Baron Power would return in the next vacation to try Mr. Fitzgerald. He thought it also necessary to say, that the trial was postponed on account of the ill state of the prisoner's health and his affidavit of it, which kind of affidavits he knew ought always to be sparingly received. The trial, he was therefore of opinion, ought now to be put off.

The *Attorney General* declared that government had ordered him to prosecute the gentlemen who had wounded Mr. Fitzgerald in prison, with the same *rigour* as he was directed to prosecute Mr. Fitzgerald himself.

The Court then adjourned for half an hour, to let Mr. Fitzgerald be carried out.

As soon as the Court was opened again, Mr. Brecknock claimed it as his right, as an Englishman, to have a jury of *medicus lingua*.

The *Chief Baron* informed him that whenever he was tried he would be tried according to law.

Andrew Gallagher, John Gallagher, James Martin, Luke Higgins, Charles Higgins and Edward Martin, were then brought up and arraigned on the following indictment:

County

County of Mayo,
to wit.

} THE Jurors of our Lord the
King upon their oath present;
that Andrew Gallagher, of Castlebar, apothecary, John Gallagher, coroner, James Martin, doctor of physick, Luke Higgins, of Castlebar, tanner, Charles Higgins, of Westport, gentleman, and Edward Martin of Castlebar, gentleman; with divers other persons, to the Jurors aforesaid at present unknown, being ill designing and disorderly persons, of a wicked and malicious disposition, and not regarding the laws and statutes of this realm, nor the pains and penalties therein contained, after the 24th day of June, in the year of our Lord 1778, to wit, on the 21st day of February, in the 26th year of the reign of our Sovereign Lord George the Third, now king of Great-Britain, France and Ireland, and so forth, with force and arms, at Castlebar, in the county aforesaid, with certain pistols loaden with gun-powder and a leaden bullet, which they the said Andrew Gallagher, John Gallagher, James Martin, Luke Higgins, Charles Higgins, and Edward Martin, with divers other persons, and each and every of them in both their and in each and every of their hands then and their had and held, they the said Andrew Gallagher, John Gallagher, James Martin, Luke Higgins, Charles Higgins, and Edw. Martin, with divers other persons, and each and every of them with the said pistols being so loaded as aforesaid, did then and there wilfully, wantonly and maliciously wound George Robert Fitzgerald, the said George Robert Fitzgerald being then a prisoner in the gaol of Castlebar aforesaid, by force of the gunpowder and leaden bullet shot out and discharged from the said pistol, with intent in so doing, him the said George Robert Fitzgerald to murder, against the form of the statute in that case made

made and provided, and against the peace of our said Lord the King, his crown and dignity.

They were also arraigned on the following indictment:

County of Mayo, } THE Jurors for our Lord the
to wit. } King upon their oaths present,
_____ } that Andrew Gallagher, of Castlebar, apothecary, John Gallagher, of Castlebar, one of the coroners of our Lord the King, James Martin, of Castlebar, doctor of physick, Luke Higgins, of Castlebar, tanner, Charles Higgins, of Westport, gentleman, Edward Martin of Castlebar, gentleman, and Daniel Clarke, of Castlebar, yeoman, with divers other persons, to the Jurors aforesaid at present unknown, on the 21st day of February in the 26th year of the reign of our Sovereign Lord George the Third, now king of Great Britain, France and Ireland, defender of the faith, and so forth, with force and arms, at Castlebar, in the county aforesaid, in and upon George Robert Fitzgerald, late of Rockfield, Esq. in the peace of God and our said Lord the King then and there being, did make an assault, and him the said George Robert Fitzgerald then and there did beat, wound and ill treat, so that his life was greatly despaired of, and other wrongs to the said George Robert Fitzgerald, then and there, did to the great damage of the said George Robert Fitzgerald, and against the peace of our said Lord the King, his crown and dignity.

To these indictments they severally, except Edward Martin, pleaded, Not Guilty; and on a motion of Mr. Browne, of their counsel, and upon the Court's having inspected the informations, and
his

his Majesty's Attorney General having consented thereto, Andrew Gallagher, John Gallagher, James Martin, Luke Higgins and Charles Higgins, were admitted to bail, upon being bound themselves in a recognizance for 500*l.* each, with two securities for 250*l.* each; and Daniel Clarke in a recognizance of 40*l.* with two securities of 20*l.* each.

At the close of the ordinary business of the county, the Court adjourned over the assizes to the 7th of June, being in the interval between Easter and Trinity Term.

WEDNESDAY, JULY 7, 1786.

THIS day the Lord Chief Baron and Mr. Baron Power opened the court, pursuant to adjournment. The Grand Jury were called over, and the Sheriff was directed to inform such of them as had absented themselves, that they would be, on the morrow, called upon a very heavy fine.—The Court were also pleased to order the Sheriff to have the Grand Pannel of his county summoned to attend on the Petit Jury; and that Mr. Fitzgerald and the other persons accused should be brought up early the next day.

Adjourned to ten o'clock on Thursday morning.

THURSDAY, JUNE 8, 1786.

THE Court having met, pursuant to adjournment, Mr. *Calbeck* said, that as the dock seemed very much crowded, he hoped their Lordships, before
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they proceeded to business, would consider the state of illness under which Mr. Fitzgerald laboured, and permit him to come forward, and have a place at the table, where he might be at his ease.

Mr. Baron Power. It is impossible. The Court can make no distinctions. There is no rank, no condition of men, but when accused of such crimes must meet with similar treatment. Mr. Fitzgerald must remain where he is.

Mr. Owen, of counsel for Mr. Fitzgerald, said, that it was only intended to apply to the Court for that indulgence when Mr. Fitzgerald should be called on to give testimony on the trial of the several persons who had assaulted him.

Court. On that occasion he shall have every indulgence. He will give his testimony as every other witness does, on the table; a chair will be provided for him, and every other thing done to render him as easy as possible.

The *Court* then called upon Mr. Attorney General to declare which number he meant to proceed in first; and he having declared that he intended to proceed first as to Mr. Fitzgerald; for if Mr. Fitzgerald should be convicted, he could, before attainder, be used as an evidence against those persons who had assaulted him in the prison.

The *Lord Chief Baron* had thought the law to have been so as at the time Mr. Fitzgerald had been brought up before, but on his researches since, he had found in Hawkins and the other books which treat on the subject, that the law was otherwise.

Mr

Mr. *Attorney General*. Where a conviction is to prevent a witness to give testimony, the record of his conviction, Hawkins says, must be shewn; and no record can be made up before judgment; and therefore it is intended to be after attainder that a man is rendered incompetent. Conviction before that only goes to his credit.

The Court asked Mr. Calbeck what he said to that?

Mr. *Calbeck*, of counsel for Mr. Fitzgerald, said he was but in one case.

Mr. *U. Burke*, of counsel for Mr. Fitzgerald, hoped that the Court would proceed to try the case of the first enormity the first; that they would consider Mr. Fitzgerald in the custody of the law, without the walls of a prison when the attack was made upon him. They would also consider the prudence and good sense of proceeding against the other persons first, when they remembered that if there be any thing in the objection against a witness being competent after conviction, that it would operate fatally in that case, in as much as Mr. Fitzgerald was the solitary witness against them. So that there must be here a failure in justice. In the case of Mr. Fitzgerald there were many witnesses, and therefore there could be no such inconvenience.

M. *Stanley* insisted, that although it was discretionary in the Attorney General to conduct the prosecution in such manner as he thought fit, yet the Court ought to take care that the trials should be proceeded on in such manner as might best answer all the purposes of justice.—There appeared on their Lordships books several bills of in-

dictment against Mr. Fitzgerald for the murder of Mr. Mc. Donnell and Mr. Hipson. There also appeared a bill of indictment against Gallagher, Higgins, and others, for attempting to assassinate Mr. Fitzgerald, when in goal and in the custody of the law for the murder. The Court had a right to look into the informations upon which those different bills of indictment were founded, and they would see that only one person, namely Mr. Fitzgerald, had sworn any information against Gallagher and Higgins for breaking into the goal, and attacking him there. Whereas they would also see that several persons had sworn informations against Mr. Fitzgerald for the murder. Mr. Attorney General had declared that he had received instructions from Government to prosecute the persons who had attacked Mr. Fitzgerald in the goal, with the same rigour that he prosecuted Mr. Fitzgerald himself, and yet Mr. Attorney General now wanted to proceed upon the trial of Mr. Fitzgerald first; the consequence of which would be, that if Mr. Fitzgerald was convicted there would be an end of the prosecution against the persons charged with the attack on him in the goal, as the only witness against them would be incapacitated from being examined; as it is clearly laid down by Sergeant Hawkins, 2d vol. 432, that "a CONVICTION and a *fertiori* on attainder of treason or "felony are good exceptions against a witness." He trusted, however, that the Court would hold the scales of justice equal, and direct the Attorney General to proceed in such manner, as might best answer all the ends of public justice. No inconvenience could follow from postponing the trial of Mr. Fitzgerald until after the persons who were charged with attempting to assassinate him in the goal were first tried. But this great inconvenience and injury to public justice

tice might follow, by trying Mr. Fitzgerald first : that if he was convicted, the only witness for the Crown was rendered incompetent. Besides that, a false prejudice might arise in the minds of the public in favour of those gentlemen who were charged with the attack on Mr. Fitzgerald, if his trial and conviction should precede theirs ; for though he knew that the guilt or innocence of Mr. Fitzgerald ought to have no influence whatever on the trial of Gallagher and Higgins, yet it was impossible to prevent or check the prejudices of human nature.

The *Court* proposed to Mr. Attorney General to try all the persons who had broken into the gaol, except Andrew Gallagher.

Mr. Attorney General. In truth the same reasons would have operated, had not the Court made that kind of proposal, as to Andrew Gallagher ; for had he been convicted, if the doctrine of conviction laid down here be right, he could not have been produced on the trial of Mr. Fitzgerald, and then there was an end of that prosecution. But he felt no difficulty in embracing the proposal of the Court. Yet he would take upon him to declare, that the gentlemen were ignorant of the nature of the prosecution against Gallagher and the others ; for he had many more witnesses on his brief than Mr. Fitzgerald : and he also once again thought it necessary to declare, that he had directions from Government to prosecute these gentlemen with the same rigour as he should prosecute Mr. Gallagher.

Mr. Blosset, of counsel for Mr. Gallagher, said he had heard the Attorney General, who had the conduct of Crown-prosecutions, and from what fell from

from him, as to the trying of the prisoners for the assault first, he thought it necessary to observe, that there was a wide difference between the nature of their crimes. One was an offence which was not considered in so high a degree of criminality by the common law, as it now is. A late act of parliament only, had made it capital. The constitution looks, and their Lordships would look with a jealous eye upon every invasion or alteration of the great bulwark of public liberty, the COMMON LAW. Their Lordships had the inspection of the indictments, a benefit to which his clients could not resort. Perhaps they might be indicted for the highest offence under that statute, *an intention to commit a murder*; but what was the other case? a *murder* actually committed.

Here the court interrupted Mr. Blosset; and Mr. *Baron Power* said, that he hoped counsel would make no comparison between the nature of the crimes; for if they did, the court must, from necessity, make some observations. It was only now necessary to say, that breaking the gaol was one of the highest offences, and only to be considered in that light.

Mr. *Blosset* was glad he was authorised by the Court to consider it so. His client's case was just so. It was inferior.

The Court asked Mr. Blosset if he had any motion to make. The Court had intimated a wish to try all the persons accused with the crime of assaulting Mr. Fitzgerald first. The Attorney General had consented. What then did Mr. Blosset mean?

Mr. *Blosset*. The question before the Court was, Whether they should try the four gentlemen now at the bar, or Mr. Fitzgerald first? The question was

was also, whether they should be tried without Mr. Andrew Gallagher, who was charged with them of the same crime, and in the same indictment, and was also now at the bar. This he contended was a difficulty to Mr. Andrew Gallagher. The evidence against them must be the same. Their defence therefore must probably be the same, and that defence once known may be rebutted. Nothing but the impossibility of getting his client a fair trial otherwise could induce him to object, but he thought his defence being known, that would be impossible.

The Court over-ruled the motion, observing it was the first time that an objection had been even made on the defence, that the evidence on the part of the Crown would be disclosed.

TRIAL of *John Gallagher, James Martin, Luke Higgins, Charles Higgins, and Daniel Clarke.*

THE Clerk of the Crown directed John Gallagher, James Martin, Luke Higgins, and Daniel Clarke, to look to their challengers; and the Grand Pannel of the county was called over, and the following gentlemen were sworn of the Petit Jury:

Dominick Geoff. Browne, of Castlemagarret, Esq;
 The Honourable John Browne, of Elen-hall, Esq;
 James Browne, of Browne-hall, Esq;
 Peter Lynch, of Castlecarra, Esq;
 James Lynch, of Cullen, Esq;
 John Moore, of Ballintaffy, Esq;
 James Gildea, of Crosslough, Esq;
 John Joyce, of Oxford, Esq;
 Edmond Taaffe, of Woodfield, Esq;
 William Ousley, of Rulhbrook, Esq;
 Bernard Stewart, of Castlebar, Esq;
 Valentine Jordan, of Oldhead, Esq;

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The Clerk of the Crown then read a note of the indictment from the crown-book, to the following purport; That they John Gallagher, James Martin, Luke Higgins and Charles Higgins, with others, stood indicted, for that they not regarding the laws and statutes of this realm, &c. did with pistols, shoot at, with intent to murder George Robert Fitzgerald, Esq.

He then read the note of the indictment against them for a common assault.

Mr. *Bloffet* objected to their being put upon the two indictments together; and the Attorney General having agreed to put them on both, Mr. *Bloffet* again urged, that in the indictment for the simple assault, it was no matter what intent the assault was made with; but was not so in the other indictment. He hoped, therefore, if the Court should insist to put them upon their trial for both offences at once, that he might be at liberty to speak to evidence to the common assault, provided he in that event steered clear of the felonious assault. My Lord Coke lays it down expressly, that though it was an immemorial usage not to admit counsel to speak to evidence upon capital criminal charges, yet it was an usage which had not the sanction, nor was it warranted by any authority of law.

The Court having given no opinion, Mr. *St. George Daly*, the junior counsel for the Crown, opened the indictment; and the Attorney General stated the facts of the case; which being recited in the evidence, is not here inserted.

The first Witness for the Crown was George Robert Fitzgerald, Esq. Examined by Mr. O'Hara.

Previous to his examination, he said that it was
extremely

extremely disagreeable to him, to give evidence at all.—He had, however, rather state the facts himself, than follow the examination of counsel. Mr. O'Hara observed, that in examining him he should follow the order which appeared in his own information; he also warned him not to state any thing which related to Andrew Gallagher, who was not then upon his trial. Mr. Fitzgerald then said, that as to Andrew Gallagher, he had but one thing to say, and that was to his credit.—He then proceeded to give his testimony, which was, that on the 21st of February last, his house was broke open, and some time afterwards, he was told that he was arrested—he was taken by a great number—a mob.—He requested to be put in the hands of the Sheriff, and he was so.—Mr. John Gallagher, the prisoner at the bar, was one of the mob who had taken him.—The taking was accompanied with circumstances of great violence; his house was broke open, and several shots were fired. He was put into the gaol on the 21st of February. When he was put into the gaol, he was taken into the room which is called the Marshalsea. There were two centinels put upon him, as a guard.—The corporal desired them to load, and fire on any person who might break in.—He was told afterwards, dinner was ready for him below stairs—he could not exactly say when he was told so, nor did he exactly recollect who called him to dinner.—He did not go down directly, because the centinel would not permit him, until the corporal came and relieved the guard. So soon as he was permitted, he went down. The doors of the room where he had been at dinner were broken in—there was a previous circumstance thereto. Some time after he

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came

came down, the Sub-sheriff came in.---He informed the witness that the gaoler had been just then changed---that he had business to go up into the Marshalsea, and must take one of the centinels with him. He, without consulting the corporal, took one of the centinels up stairs and left one.---Soon after a number of people forced open the door---it was not long after---it was while the Sub-sheriff was above stairs.---The door was shut when they forced it open, and he believes the persons who broke open the door entered.

[Here the witness looked at the bar.]

He saw four of them at the bar, one of them commonly goes by the name of Doctor Martin. He was told his name was James, but does not know.---Another of them, Mr. Charles Higgins, believes he lives at Westport.---Another of them, Mr. John Gallagher, and the other Mr. Luke Higgins.---He was not certain whether they were the persons who forced the door of the gaol, but they came in. *He would not take upon him to say whether Daniel Clarke was there.*---A good many others entered besides the persons at the bar---they were armed---he recollected some of the arms---they were pistols and sword canes, and afterwards a firelock. Doctor Martin had a pistol and a sword cane, but till the pistols were fired the sword canes were not made use of. There was a great many had sword canes. Mr. John Gallagher had a pistol, but the witness did not perceive that he had any sword cane.---He could not tell who first assaulted him, or the manner of the assault. John Gallagher collared him---and several pistols were fired at him.---The others had pistols.---He could not say how many fired at him; there were marks of shots in

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the wall, and it appeared that there were five marks, one of which was charged with swan shot and a ball. There was a ball in his thigh which was not yet extracted. While John Gallagher collared him there was a sixth shot fired at his head, which he perceived—he put up his hand to change the direction, and it broke the ring on his finger. The party began to thrust at him—He struggled with John Gallagher, and got loose from him. So soon as they had fired at him, they thrust at him with sword canes—One he particularly was certain thrust at him, it was doctor Martin—the thrust was in a very particular manner, which he would mention. As he made the thrust, the witness got the middle finger of his right hand round the sword, in order to direct it from his body, and it ran up into his arm and there broke.—It was impossible for him to say how many wounds he got then, or before, or after he got loose from John Gallagher—but he got a great many—One circumstance particularly he recollected of Doctor Martin—he was poking at him from behind, and finding that the point did not enter the witness's coat, he shortened his grip, and tried to bore it through his coat without effect.—After he got free from Gallagher they still continued poking at him. There were one or two lights in the room—he was not positive which—they were extinguished at last—it was impossible for him to tell by whom, but he recollects that the candle was given to a boy to hold by one of the party, and that the man who gave it to him struck the witness with the candlestick. [Here the witness shewed the mark of a wound on his head.] When the candle was put out, they seemed in a great hurry to get out—the stroke of the candlestick was not the least injury he received—the firelock had been before taken from

the centinel during the attack, whether forced from him or not he did not know, but he knew that the centinel gave him no assistance---one of the party stood at the door with the firelock---he afterwards held it by the extremity and struck the witness with the but end of it on the head until he struck him under the table---they continued beating at him with the but end of their pistols and the musket for some time---almost all the sword-canes had been broken---every one of the party struck him---he could not tell how many wounds he had received---when they had struck him under the table, he begged of them to desist for they had done what they wanted; they had done his business, for he supposed their purpose was to dispatch him; on which, John Gallagher swore a violent oath, that he believed his business was done, but if it was not they would return on the morrow and hang him, and he, Gallagher, would dance on his the witness's shoulders.---In their striking of him he put up his hands to save his head, and received several strokes on his hand, and one of the bones of one of his fingers in the back part of his hand was broken, so as that he had lost the use of it.

He was cross examined by Mr. Blosset.

A few days after the affray, a magistrate had been with him---It was Mr. John Browne, one of the jury. He asked some questions, but not positive what they were. He was not sure whether he had sworn any informations; but he rather inclined to think he had---Does not recollect whether he had the informations ready written, or whether Mr. Browne took them down---he was not in a situation to have a perfect recollection---Mr.

Browne

Browne would best recollect---he could not recollect any part of the information, but he knew that the name of Clarke was mentioned. He recollected swearing other informations before another magistrate; but before whom he did not recollect---he could not say at what distance of time he had sworn them, but it was at a considerable time after.---He could not recollect any firelock but the one in the centinel's hand, from the crowd about him. He was in that situation to be incapable of observing whether the centinel returned or not.---*There was not one shot fired* before the party rushed in, as he recollects---he was told that one shot was fired by the centinel above stairs, to alarm the garri-son and the town---he could not tell whether to believe that report or not---he heard it from persons, of whom he could not tell, whether they were indifferent to the event or not---circumstances might alter men's dispositions---He was obliged to Mr. Blosset for putting him in mind of one circumstance---there was a bayonet on the end of the musket, and he felt the effect of it---one of his teeth was struck out by a stroke from it---another of them was broken, and he believed its being broken hindered the bayonet from going down his throat---he could not tell whether it was discharged or not---he believed it was---It would have been fortunate for him if the candle had been put out sooner, for they might have hurt themselves---he could not ascertain the number who had come into the room, but it was crowded near where he stood---the party was in motion about him, and very active---he could not say whether several persons during the affray passed between him and the candle---they did not come into the prison to hurt each other, they came there to hurt him---he dared to say, they did not come to hurt each other, for
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if they had that intention they could find each other out of doors---John Gallagher held him---He ran no hazard by doing so unless in the confusion.---The witness had been robbed before he got into prison of his shoe-buckles---*he had nothing of value about him but two guineas, which happened to be in his fob---he had no watch or ring but that which was broken---he recollects being robbed when he was taken at Turlogh---the two guineas in his fob were safe---*When he was robbed at Turlogh his purse might have contained more than 25 guineas---but he had no purse in the prison nor any watch.

Second witness, Mr. Patrick Clarke, examined by Mr. Paterson.

He is Sub-heriff of the county of Mayo---he was in his gaol on the night of the 21st of February about eleven o'clock---he recollected that some persons had forced into the goal, and had committed violence first upon himself, and afterwards on Mr. Fitzgerald---the witness found Mr. Fitzgerald, when he went into his apartment, wounded and very ill treated---he could not take upon him to name any of the persons who broke in---he did not know any of the prisoners to be any part of the party---he was pulled down---he made a violent outcry and called out murder---he was assisted by Mr. Ellison, who brought a guard---he was coming out of Mr. Fitzgerald's apartment when he was seized---*the candle was instantly put out*---one of the shots, he believed, was fired at himself---it was impossible for him to tell who had fired the shot---it was fired at some distance and in the dark.

He

He was cross examined by Mr. Browne.

He saw Charles Higgins upon that night---he had taken him with him to the gaol, as a friend and witness to his indenting the new gaoler.--- Charles Higgins was with him when he was attacked; he, Higgins, had no weapon, and he believed that he could have no weapon without the witness's knowledge.

The Court here took up the witness. He for some time did not know what became of Charles Higgins---indeed for some time he did not know what became of himself---he supposes he made the best of his escape.

Here the Court examined Mr. Fitzgerald again---he recollected that Clarke, the Sub-sheriff, and Charles Higgins were in his room that night previous to the outrage.

Third witness, Robert McBeth, examined by Mr. Daly.

He was centinel in the prison of Castlebar on the 21st of February---he was fixed at 7 o'clock, and staid till between ten and eleven. A little after ten, or between ten and eleven, a parcel of men rushed into the prison---the first man rushed up furiously to Mr. Fitzgerald---the witness asked him was he going to murder the man---He then received a stroke from behind, which knocked him upon a chair---so soon as he began to recover himself, he perceived several shots fired, shot after shot, and on firing the shots the candle was extinguished---he could describe the person who first forced in, but he did not know him---he was a tall man,

man, taller than the witness—he wore white clothes—he could not distinguish any person in the dock who was concerned in abusing Mr. Fitzgerald. *The candle was immediately put out, and the affray lasted for four or five minutes.*

The fourth witness, George Daniel, Esq; examined by Mr. Attorney General.

He knows the prisoners—he lent Mr. Luke Higgins a case of pistols on the morning of the 21st of February—he found one of them in the gaol of Castlebar between the hours of nine and ten on the night of that day after the assault on Mr. Fitzgerald—he found the pistol in the centinel's hand, he believed in McBeth's.

Here *McBeth* was called again and proved that he found the pistol, which he had given to Mr. Daniel, on the floor of Mr. Fitzgerald's apartment in the prison.

Mr. Daniel was cross examined by Mr. James D'Arcy.

He could not tell for what purpose the pistols were borrowed by Mr. Higgins; they were borrowed the day that the inhabitants went to Turlough—he saw Mr. Higgins on horseback there—he believed they might have been borrowed for the purpose of going with the other gentlemen to apprehend whoever committed the outrage—he found the pistol charged the next morning after he had gotten it from McBeth, and it had never been out of his custody—he was hurt at finding his pistol in Mr. Fitzgerald's apartment—on the third time of sending for his pistols, the other pistol was restored—the

the first and second time of his sending, the messenger informed him that Mr. Higgins was out of town—When he met Mr. Higgins, he informed, the witness that the pistols had been taken out without his knowledge.

On a question being put to him by the Court on the suggestion of Mr. U. Burke ; he answered, that he found no body in the goal, but Mr. Fitzgerald in the way which had been described, and a woman supporting him ; nor did he see any person coming out of goal.

The fifth witness, the Honourable George Pomeroy, examined by Mr. O'Hara.

He went to the goal on Tuesday the 21st of February, after the outrage—He saw no person coming out of the goal, nor at or near the goal.

The sixth witness, Pomeroy D'Arcy, Esq. examined by Mr. Daly.

He knew the gentlemen at the bar—all he knew of the attack on Mr. Fitzgerald was, that on the night of that affair he had spent the evening abroad ; at about 10 o'clock, he met Mr. John Gallagher, Mr. Edward Martin ; and a third person whom he did not know—there was no conversation between him and Mr. Gallagher—he met them at the end of the session-house—Mr. Gallagher had no arms—he thought Mr. Edward Martin had a gun in his hands—there were no applications made to him to conceal what had passed that night.

Here the prosecution was closed, and before the prisoners were called upon their defence, Mr. Fitzgerald was again called on by the Court—He had, he said, already mentioned that he had no

other money in his pocket but the two guineas—he had been rifled before he had left his own place.

The prisoners were then called upon to make their defence, and they accordingly called their

First witness, John Burke, who was examined by Mr. Bloffet.

As he spoke only the Irish language, Mr. Peter Smith, one of the assistants to the Clerk of the Crown was sworn to make true interpretation.

He lived with Andrew Gallagher last February. His master has a house in town, and company dined with his master at his house on the day that Mr. Fitzgerald was hurt—the company was Thomas Gibbons, James Reid, and John Gallagher, his master's brother, the coroner—he knew Doctor James Martin—he lived in that town—he lodged in Andrew Gallagher's house—he recollected seeing Pat. Clarke that night—he came to his master's house and enquired there for Charles Higgins: the door was shut when he came; the witness opened it and let him in—Clarke did not tell him what he wanted with him—the witness told him that Higgins was above stairs in Doctor Martin's room, with the Doctor and Jack Gallagher—this was about ten o'clock at night—the last of the people who had dined with his master went off—Doctor Martin and Higgins did not go—Clarke went up, and when he went up, went into Doctor Martin's room—Mr. Clarke and Charles Higgins went out together—Andrew Gallagher was then asleep in his bed—he saw Doctor Martin and John Gallagher go into Gallagher's room—Andrew Gallagher was much fatigued when Pat. Clarke came

came—John Gallagher was in Doctor Martin's room; they after went into Andrew Galagher's room—He knew William Melvin; he saw him that night; he called for his master—the witness told him his master was in the witness's master's room with Doctor Martin—John Gallagher came and desired William Melvin to wait for him and he would be with him just now—the witness heard a noise in the street, and went to enquire what the noise was; he heard a cry of murder, and was told it was George Fitzgerald had escaped out of gaol—the witness returned to his master's room, and told Doctor Martin, John Gallagher, and his master what he had heard, and that was, that there was murder about the town, for George Fitzgerald had made his escape—Doctor Martin and John Gallagher went out and Melvin went with them—he heard no shots when he left his master's house—he and Melvin thought it a fight, and went to see what the matter was—at that time there was a great crowd about the gaol.

He was cross examined by the Attorney General.

Andrew Gallagher has no other servant in the house but the witness—He has no apprentice—the witness is Andrew Gallagher's only servant—his master, Andrew Gallagher's house, is next door to Moran's the gaoler—he heard a noise, but no shots—there was a riot about the gaol when he went out—Charles Higgins was not with his master.

Second witness in the Defence, William Melvin, examined by Mr. Browne.

He was servant to Mr. John Gallagher—he was sent on the night of February 21st to Andrew Gallagher's

Gallagher's house for his master, by his master's sister—he was to say a gentleman wanted him—His master came out to him there, and bid him wait—soon after his master came to him, the witness heard a noise in the street—the witness went to the door, and John Burke (Mr. Andrew Gallagher's servant) went out and returned with news that Fitzgerald had escaped—The witness and John Burke went to Mr. Andrew Gallagher's bed-chamber—they found Andrew Gallagher there—he was ill in bed—his master (John Gallagher) and Doctor Martin were in the room—Doctor Martin and John Gallagher went out together; the witness and John Gallagher went on to the gaol, where Fitzgerald's wounds were then dressing by Doctor Lindsay.

He was cross examined by Mr. O'Hara,

His master or he did not speak to any person on their road home.

Here Pomeroy D'Arcy, Esq. was called again, and examined by the Court.

He did not speak to Mr. Gallagher when he saw him the night of the outrage. The outrage was committed before he had met him and the other men.

Third Witness in the Defence, George Smyth examined by Mr. D'Arcy,

On the night of the affray in the gaol, he went with Mr. Luke Higgins to Mr. Thomson's—he is an outside servant to Mr. Luke Higgins—Doctor Swaite, John Nolan, Doctor Martin and Charles Higgins, had dined with his master that day—his master

master lives in the house with Doctor Boyde---The company broke up between nine and ten---Mr. Luke Higgins delayed for half an hour, until he put up the remnants of all the liquors which had been laid out for dinner.---Mr. Luke Higgins called for John his servant, and was answered that John was gone to the stable---he then ordered the witness to get a lanthorn, and light him up street---the witness did so, and lighted him up to Mr. Thompson's---Mr. Higgins went in there, and desired the witness to wait---Thady Corcoran came to Mr. Thompson's, and asked for Mr. Higgins---the witness sent in for his master by one of Mr. Thompson's servants---when he came out, Corcoran told him, that Mr. Fitzgerald was making his escape; that there was a great riot and firing in the gaol---Mr. Higgins then said to Corcoran, that he, Higgins, could not help that---that was no place for Corcoran to be in, and desired him to go home---his master went home from Thompson's, and did not go near the gaol.

He was cross-examined by Mr. Paterson.

His master would not let the witness make up his horses---the horses were always in town, and the witness never made them up---Thady Corcoran is one of Mr. Higgins's tanners---He sent in by a servant for his master at Mr. Thompson's, and did not go himself.---Mr. Thompson's house is opposite to Mrs. Petche's, and is opposite to the gaol---it is at the corner of the lane leading to the castle, there was no alarm in the place where the witness was, until Corcoran came---if there were any the witness himself must have heard it---Doctor Martin, Charles Higgins, Doctor Swayle, and Mr. John Nolan, had dined with his master---Mr. Charles Higgins did not sup at Mr. Thompson's

as he believes. Moran's house is the only house between Andrew Gallagher's house and the court-house—the gaol is under the court-house—He heard no riot when he was going home.

Fourth Witness in the Defence, Thady Corcoran, examined by Mr. Bloffet.

The witness is a tanner—he tans for Mr. Luke Higgins—he did so on the 21st of February last—he knew the last witness, George Smyth, who is a servant to Mr. Luke Higgins—he saw Mr. Luke Higgins and Smyth going into Mr. Thompson's on the night of the riot in the gaol—the night was very dark, but he saw them very plainly, for his master had George Smyth with him, and Smyth carried a lanthorn—after his master went into Thompson's, he heard a noise in the gaol, and several shots firing—the witness was in John Barret's house, in the lane where the gaol is—John Barret's house is *forment* the gaol—when he heard it, he went in to Mr. Thompson's to let Mr. Higgins know that the report in town was, that Mr. Fitzgerald was making his escape—the reason why he went to tell his master of this report was, because his master was a friend to Mr. Mc.Donnell—he saw his master at Mr. Thompson's, but he first saw George Smyth—he told his master that he supposed Mr. Fitzgerald was trying to make his escape, and his master said he could not help it, if he did make his escape—he bid the witness to go home; and the reason why he bid him go home, was that he might be early at his work.

Here he was cross-examined by Mr. Daly.

His work is usually done at about seven o'clock—he generally goes to bed at eleven; he was up
that

that night at eleven—He never tried what time would serve him for sleep, but he believed that he could do with an hour's sleep, if it were necessary.—George Smyth is an out servant to Mr. Higgins—he is his steward—he attends his house and gardens, and sometimes takes care of his horses—the witness would venture on his oath to declare that George Smyth did not take care of his master's horses every day—his master has very good horses that he would not trust to his care. He believes Mr. Thompson to be in town.

Anne Chambers was then called on behalf of Daniel Clarke, but not remembering the night of the riot, was not examined.

The *Court* called upon Mr. *Fitzgerald* again, who declared that on the day after the riot he was not perfect master of himself—he did not recollect whether he at that time charged any person with being concerned in the affray, but remembered a conversation in which Clarke's name was mentioned. In his second information he charged more than six persons; he in them charged the four prisoners at the bar, Edward Martin, Andrew Callagher, and others.

The *Court* then called upon the Hon. *John Browne*, the magistrate who took the first informations; who was sworn to give evidence to his fellow jurors.

He went to take the information of Mr. *Fitzgerald* at the request of Mr. *Ellison*, on the next morning after the outrage, at about twelve or one o'clock; he understood Mr. *Fitzgerald* had sent for him—he (Mr. *Fitzgerald*) was in his bed—he took his examination from his own mouth,
word

word for word, in the presence of Mr. Ellison.—Mr. Fitzgerald told him, that Doctor Martin and Daniel Clarke were *the only two he knew*; on account of Mr. Fitzgerald's being ill, and supposing he might be weak in his understanding, the witness cross-examined him, and from the very pertinent answers he received, was convinced that Mr. Fitzgerald was fully master of himself—He said *that Clarke was a Wheel-wright or a Coach-maker, of a very tawny complexion, very like an East-Indian Black*. He never saw any man more perfectly collected than Mr. Fitzgerald was at that time—he had doubtless suffered a good deal from his wounds, but from his conduct and recollection, the witness did not think him to be as bad as he pretended to be.

[Here the witness was shewn the information.]

That was the information he took; the whole of it his own hand writing.

Here the Clerk of the Crown, by order of the Court, read the information as follows:

County of Mayo, } An Information sworn before
to wit, } the Honourable John Browne,
_____ } on Wednesday the 22d day of
February, 1786, signed George Robert Fitzgerald,
his mark.

THIS Informant being duly sworn on the Holy Evangelists, saith, that last night, the 21st of February, as Informant was sitting in his room in the gaol of Castlebar, *some people fired several shots through the door of said room, and then broke the door open, when James Martin, Esq; and Clarke, a Wheel-wright or Carpenter, who Informant believes is called Daniel Clarke, came into the room* with

with several other persons, who attacked Informant with pistols and a sword, and therewith wounded Informant in several parts of his body and head, to the imminent danger of Informant's life.

Mr. *Browne* requested the Court to ask Mr. *Ellison* if he did not read that examination three or four times to Mr. *Fitzgerald*.

The Court then called upon the Reverend *Thomas Ellison*, Clerk, who, being sworn, said,

He was present when Mr. *Browne* received Mr. *Fitzgerald*'s information—Mr. *Fitzgerald* particularly charged Doctor Martin and Clarke, only, by name—he was asked if they were the only persons he knew—his answer was, he knew none others. He was very weak and low in body, but perfectly master of his senses. The examinations were read more than once to him, Mr. *Fitzgerald*.

Here Mr. *Browne* suggested to the Court to ask Mr. *Ellison*, if he recollected that when Brecknock wanted to suggest something to Mr. *Fitzgerald*, that he read the examination once again to Mr. *Fitzgerald*, and would not permit him to swear thereto until he heard them read again.

Mr. *Ellison* did recollect it—In about a month after the swearing the first examinations; he could not however be exact as to the time, he took another information by the desire of Mr. *Fitzgerald*, in which he charged Doctor Martin, Andrew Gallagher, John Gallagher, Luke Higgins, Charles Higgins, and Edward Martin, with others, with the offence of attacking him in the gaol.—He asked Mr. *Fitzgerald* why he had not before made any charge upon them; his answer was, that he was not at that time sufficiently collected to know them all.

The information was here produced to the witness—The name Thomas Ellison, subscribed thereto, was his hand-writing, it was the information which he took from Mr. Fitzgerald.

The *Court* then directed the Clerk of the Crown to read that information also, which he did, as follows :

County of Mayo,	} An Information sworn before
to wit.	
_____	the Reverend Thomas Ellison,
	on the 17th day of March,
	1786, signed George Robert Fitzgerald.

THIS Informant being duly examined and sworn on the Holy Evangelists, saith, That, on Tuesday the 21st day of February last, John Gallagher, one of the coroners of said county, accompanied by a great number of persons, came to Examinant's house at Turlough aforesaid, and, after committing great violence, robberies, and outrage in and about said house, said Gallagher made a prisoner of this Examinant on an execution or executions, writ or writs, for debt, and brought Examinant in close custody to the town of Castlebar, and lodged him in his Majesty's Gaol of said town.—That about the hour of eleven o'clock on the night of said day the following persons, viz. John Gallagher, one of the coroners of this county; Andrew Gallagher, of the town of Castlebar, apothecary; Edmund Martin, of Castlebar; James Martin, *M. D.* of the town of Castlebar; Charles Higgins, of Westport, in said county; Luke Higgins, of Castlebar, farmer, and some other persons unknown, with premeditated and intended malice, wantonly, maliciously, and feloniously entered the apartment of said gaol where Examinant then was; all armed with a gun, pistols, swords, and other offensive weapons, and violently attacked

attacked Examinant, fired the said gun, which was loaded with powder and leaden bullets, at Examinant, and also fired several pistol-shots at Examinant, and wounded him in many parts of his head and body.—That said several persons treated Examinant in so barbarous a manner that his life was despaired of.—And saith, that from the many and desperate wounds he then and there received, that Examinant has remained in a languishing state, attended by physicians and surgeons, even since.—That by means of such abuse and languishing state, occasioned thereby, Examinant was unable to give in this his examination sooner than the present time.—And saith, he is well convinced, if said several persons had not intentionally put out the light or lights then in said apartment, and had not taken for granted that Examinant was dead, they would have continued their said violence and abuse until they would have actually put Examinant to death.—That when he came to his senses, and was able to examine his pockets, he found that said several persons had robbed him of twenty-five guineas and upwards in cash, together with his watch and seals, which Examinant is convinced said several persons, or some or one of them, so feloniously stole and carried away when they left Examinant for dead, in manner aforesaid.

Here the Lord Chief Baron charged the Jury, and said, that they must dismiss Daniel Clarke from their attention, for though Mr. Fitzgerald had with great accuracy once described him to Mr. Browne, yet this day, when on the table, though he was, as the Jury observed, perfectly collected, and thoroughly in possession of his faculties, he made no charge against, nor could he remember him at all. He thought it his duty to state the law as it

stood, as to the offence: At common law it was no more than a high misdemeanour; but, by a late act of parliament, the legislature had made it a capital offence; but in order to sustain the charge laid in the indictment, the shooting must have been such, that if it had taken effect, the homicide, which was the consequence thereof, would be murder; and there could not be a doubt that if a homicide had taken effect in this case, that it would have been a murder; if Mr. Fitzgerald's testimony were to obtain credit, and that testimony being credited, the intention to commit a murder was clear. The only fact then to be enquired into, to him seemed to be, who had perpetrated the fact. For that purpose he should state all the evidence; and, after having done so, make a few observations upon it, not at all intending to invade the province of the Jury as to enquiring into all the matters of fact. He then very fully went into all the evidence; and, after concluding it, observed, that the examinations of Mr. Fitzgerald, and his testimony on the table, differed materially as to two circumstances—the shots previous to the entering the gaol, and the robbery on his person of 25 guineas. This last fact he charges in his information, whereas he had now given evidence on the table that he had only 2 guineas in his sob, which remained after the outrage; and a most barbarous outrage it was, let it be perpetrated by whom it might; and he had to lament the melancholy state of a country, where a man, though in the custody of the law, was not protected from the most savage attacks of inhuman assassins. There can be no doubt in the mind of any man, if a homicide had taken place, that that homicide would have been murder, and he was free to confess, that he would have had less doubt as to the case of the prisoners, if they had

set up no defence at all, but rested on the state of the case on behalf of the Crown, and made its weakness their strength. What was the defence? *An Alibi*—Certain it is, that this is the best kind of defence, when it is respectably supported—but when the nature of the testimony given upon this occasion, and the persons by whom it was given are considered, great doubts must arise. John Gallagher and Edward Martin were seen together by Mr. D'Arcy, at the corner of the prison—Mr. Daniel found his pistol in the prison, and how were these circumstances accounted for, the one by a common servant of Mr. Gallagher's, and the other remained unaccounted for at that hour—But still greater doubts must be excited from the comparison of the examinations with the testimony given on the table. Mr. Browne had told the Jury, that Mr. Fitzgerald had been perfectly collected when he gave his first examination, and Mr. Ellison had told them, that it was a month after when he gave the second; in the first information he charged only two, and knew no more; in the second he charged six; in that second, he charged a robbery; on the table he denied being robbed—If then, the Jury thought, that in the first information he erred, merely because he was not sufficiently collected, and did not believe the *Alibi* set up by the prisoners, they must convict them; but, if, on the contrary, they did not believe the testimony of Mr. Fitzgerald, they ought to acquit them—and if they entertained any doubts—he did not mean light or capricious doubts, but these doubts which may be entertained by a prudent, discreet, and steady man, they ought to incline to the side of mercy; and if they thought them guilty of the assault, yet not with an intent to murder, they ought to acquit them of the capital

pital offence, and find them guilty on the other indictment only.

The Jury withdrew for a quarter of an hour, and then returned with a verdict acquitting all the prisoners in both numbers.

A loud expression of joy having taken place on this verdict's being found, the *Chief Baron* spoke with great resentment against the indecency of such a conduct, and ordered the Sheriff to take any person into custody who should again presume to act in such a manner.

The Court then adjourned to eight o'clock the next morning.

Counsel for the Prosecution.

Mr. Attorney General,
James O'Hara,
Francis Paterson, and } Esqrs.
St. George Daly,

Agent, M. Kemmis, the Crown Solicitor.

Counsel in the Defence.

John Blosser,
George Joseph Browne, } Esqrs.
James D'Arcy,

Agent, Mr. Henry Burke.

The Trial of *George Robert Fitzgerald*, Esq.

The Clerk of the Crown called over the Grand Pannel of the county, and afterwards called the defaulters on a fine of 50*l*. One hundred and twenty having appeared, the prisoners were desired to look to their challenges; and the Attorney General having asked if Mr. Fitzgerald and Mr. Brecknock would join in their challenges with the several other prisoners, Mr. Burke, of counsel for Mr. Fitzgerald, said that they would not. The Attorney General then directed the Clerk of the Crown to give Mr. Fitzgerald and Mr. Brecknock in charge in number two, and then asked if Mr. Fitzgerald and Mr. Brecknock would join in their challenges as to that number; and Mr. Owen, of their counsel, having answered they would not, Mr. Attorney General then asked, if they would consent to have their peremptory challenges put by; and that proposal being also declined, he directed the Clerk of the Crown to give Mr. Fitzgerald only in charge.

Mr. *Calbeck* observed, it was odd to try Mr. Fitzgerald for procuring a murder before they substantiated any murder.

Mr. *Attorney General* observed, that he would be better master of the subject when he heard the indictment read.

Mr. *Burke* applied to the Court to permit the other prisoners to remain in the dock, as Mr. Fitzgerald apprehended they could give him material assistance.

The Court having shewn a disposition to refuse the motion, Mr. *Owen* suggested that Mr. Brecknock only was charged in the present indictment,
and

and therefore it being a distinct fact, they might be permitted to stay, and Brecknock only remanded.

The Court refused the motion, and the gaol was remanded.

The following persons were then sworn of the Petit Jury :

Thomas Lindsay, of Hollymount, Esq.
 Smith Steel, of Foxford, Esq.
 James Lynch, of Cullen, Esq.
 John Moore, of Ballintaffy, Esq.
 James Gildea, jun. of Crosslough, Esq.
 John Joyce, of Oxford, Esq.
 William Ousley, of Rushbrook, Esq.
 Thomas Ormsby, of Ballinamore, Esq.
 Joseph Lambert, of Togher, Esq.
 William Ellison, of Tallihoe, Esq.
 Christopher Baynes, of Lakeland, Esq.
 James Miller, of Westport, Esq.

Twelve were put by as being on the Grand Jury, three were put by as being of the name of Mc. Donnell; and twelve were put by for the Crown; these last were all put at the desire of the Attorney General, sixteen were peremptorily challenged by Mr. Fitzgerald, and one for cause of having declared an opinion.

The *Attorney General* informed the Court, that lists of the witnesses had been mutually furnished to the agents, and he therefore moved, that all the witnesses should be removed out of each others hearing; and that they should be informed that no witness would be examined who remained in court.

The Court ruled accordingly.

While

While the Jury were swearing, Mr. Stanley asked the Attorney General, upon which bill of indictment he intended to proceed first.

He answered, upon the bill against Mr. Fitzgerald for procuring the murder of Mr. McDonnell and Mr. Hipson.

Mr. Stanley answered, I would object to that mode of proceeding.

The Attorney General answered, very well, it will be time enough to do that when you hear the bill of indictment read.

George Robert Fitzgerald was then given in charge to the Jury by the Clerk of the Crown, who read a note of the indictment from the crown book, to the following purport:

In number two, you George Robert Fitzgerald, late of Rockfield, Esq, stand indicted, for, that you, with another, not having the fear of God before your eyes, but being moved and seduced by the instigation of the devil, on the 21st of February, in the twenty-sixth year of the reign of our Sovereign Lord George the Third, now King of Great Britain, France and Ireland, and so forth, at Rockfield aforesaid, of your malice prepensed, wilfully, traitorously, and feloniously did *provoke, stir up, and procure* Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehaney, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, to *steal and murder* one Patrick Randall Mc. Donnell who was then and there a subject of

our said Lord the King, which said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, Patrick Dorning, otherwise Downey, and divers other persons at present unknown, on the day aforesaid, in the year aforesaid, with force and arms, to wit, at Kilnecarra in the county aforesaid, in and upon the said Patrick Randall Mc.Donnell in the peace of God and our said Lord the King, then and there being *wilfully, traitorously, and feloniously, and of their malice prepenfed*, did make an assault, and certain guns of the value of five shillings each, and every of the said guns, being then and there charged with gunpowder and leaden bullets, which guns they, the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, in their right hands respectively had and held against and upon the said Patrick Randall Mc.Donnell, *wilfully, traitorously, and feloniously, and of their malice prepenfed*, did shoot and discharge, and the said Andrew Creagh, otherwise Crag, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise

otherwise Downey, and divers other persons at present unknown, with the leaden bullets aforesaid, out of the guns aforesaid, then and there by force of the gunpowder aforesaid, shot and sent forth as aforesaid, the aforesaid Patrick Randall Mc. Donnell, wilfully, traitorously, and feloniously, and of their malice prepensed, and by the aforesaid *provocation, stirring up, and procurement*, then and there did strike, penetrate, and wound, giving to the said Patrick Randall Mc. Donnell, with the leaden bullets aforesaid, so as aforesaid, shot, discharged and sent forth out of the guns aforesaid, by the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterlon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, in and upon the said body of the said Patrick Randall Mc. Donnell, several mortal wounds of the depth of four inches, and of the breadth of half an inch, and of which mortal wounds the aforesaid Patrick Randall Mc. Donnell, then and there instantly died; and the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterlon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, the said Patrick Randall Mc. Donnell, then and there, in manner and form aforesaid, *wilfully, traitorously, and feloniously, and*

of their malice pre-pensed, did flee and murder, and the said George Robert Fitzgerald, and another, then and there, in manner and form aforesaid, wilfully, traitorously, and feloniously, and of their malice pre-pensed, did provoke, stir up, and procure the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present to the jurors aforesaid unknown, to flee and murder in manner and form aforesaid, the said Patrick Randall Mc. Donnell, then and there being a subject of our said Lord the King, within this land of Ireland, contrary to the peace of our said Lord the King, his crown and dignity, and against the form of the Statute in that case made, and provided:

And, in number four, you stand also indicted, that you with another, not having the fear of God before your eyes, but being moved and seduced by the instigation of the devil, on the 21st of February, in the twenty-sixth year of the reign of our Sovereign Lord George the Third, now King of Great Britain, France and Ireland, and so forth, at Gortafulla aforesaid, of their malice pre-pensed, did wilfully, traitorously, and feloniously provoke, stir up, and procure Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present to the jurors aforesaid unknown, to flee and murder in manner and form aforesaid, the said Patrick Randall Mc. Donnell, then and there being a subject of our said Lord the King, within this land of Ireland, contrary to the peace of our said Lord the King, his crown and dignity, and against the form of the Statute in that case made, and provided:

ny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, to *see and murder* one Charles Hipson, who was then and there a subject of our said Lord the King, which said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, Patrick Dorning, otherwise Downey, and divers other persons at present unknown, on the day aforesaid, in the year aforesaid, with force and arms, to wit, at Gurnesfulla in the county aforesaid, in and upon the said Charles Hipson, in the peace of God and our said Lord the King, then and there being *wilfully, traitorously, and feloniously, and of their malice prepensed*, did make an assault, and certain guns of the value of five shillings each, and every of the said guns being then and there charged with gunpowder and leaden bullets, which guns they, the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, in their right hands, respectively had and held against and upon the said Charles Hipson, *wilfully, traitorously, and feloniously, and of their malice prepensed*, did shoot and discharge, and the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly,

Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, with the leaden bullets aforesaid, out of the guns aforesaid, then and there by force of the gunpowder aforesaid, shot and sent forth as aforesaid, the aforesaid Charles Hipson, wilfully, traitorously, and feloniously, and of their malice prepensed, and by the aforesaid *provocation, stirring-up, and procurement*, then and there did strike, penetrate, and wound, giving to the said Charles Hipson, with the leaden bullets aforesaid, so as aforesaid shot, discharged, and sent forth out of the guns aforesaid, by the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, in and upon the body of the said Charles Hipson several mortal wounds of the depth of four inches and of the breadth of half an inch, and of which mortal wounds the aforesaid Charles Hipson then and there instantly died; and the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox,

Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, the said Charles Hipfon, then and there, in manner and from aforesaid, *wilfully, traitorously, and feloniously, and of their malice prepensed, did flee and murder*; and the said George Robert Fitzgerald and another, then and there, in manner and form aforesaid, *wilfully, traitorously, and feloniously, and of their malice prepensed, did provoke, stir up, and procure* the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present to the jurors aforesaid unknown, *to flee and murder*, in manner and form aforesaid, the said Charles Hipfon, then and there being a subject of our said Lord the King, within this land of Ireland, contrary to the peace of our said Lord the King, his crown and dignity, and against the form of the statute in that case made and provided.

Mr. Stanley objected to Mr. Fitzgerald's being tried upon that bill of indictment until the persons who actually committed the fact were first convicted.

He admitted the rule of law, that in high treason there are no accessories. All are principals. That every instance of incitement, aid, or procurement which in the case of felony will render a man an accessory before the fact, in the case of high treason, whether it be treason by common law or by statute, will make him a principal in treason. But yet

yet that rule must be understood with those limitations, which sound sense and substantial justice requires; for though in the final end and issue of the prosecution, the procurer of a treason may be considered as a principal, yet in all the intermediate steps towards his conviction, he ought, from a principle of natural justice, to be considered merely in the nature of an accessory, and entitled to the same privileges and advantages.—Every act which in the case of felony will render a man an accessory before the fact, will in the case of treason make him a principal—and *nothing short of such an act will.*—What circumstance therefore is necessary to render a man an accessory before the fact in felony?—clearly this above all others—*that the felony charged upon the principal hath been in fact committed, and committed by the principal;* for which reason the accessory cannot be tried till the truth of this single fact shall have been legally established either by the conviction or outlawry of the principal.

The same equitable rule is by parity of reason to be extended to all treasons of an *accessorial derivative nature.* Lord Chief Justice Hale, 1 vol. c. 22. f. 233. 259. spendeth an intire chapter on this point, he intitles it, “*Concerning Principals and Accessories in High Treason.*”

The Court. Does my Lord Hale treat of any treason under an express act of parliament?

Mr. Stanley, did not immediately recollect, —but though in conformity to the general language of the law, he called every person who can any way be considered an accomplice in treason a *principal in it*, yet when he cometh to speak of the course and order to be observed in the

the prosecution of the offenders. He considers those accomplices whose supposed guilt is connected with, and ariseth out of the real guilt of another in the light of mere accessories, and entitled to the same privileges and advantages—and it is laid down in so many words, 2 Hale, 223. If A be indicted for high treason, and B for *procuring* it, here it is true they are all principals—but inasmuch as B, in case of felony, would have been but accessory, and it is possible that A may be acquitted of the fact—B shall not be tried for the procurement till A be convicted. And it is also laid down by Mr. Justice Forster, that in all the cases of treason within the statute of 25 Ed. III. the rule prevails, that the inciter or procurer cannot be tried until the actor or principal is convicted, except in the case of that branch of treason which falleth within the clause of compassing and imagining the death of the King. In all other cases whatsoever, either of procuring a person to commit treason, or of harbouring or receiving a traitor after the fact of treason committed, though the inciter or receiver are in the eye of the law principal traitors, *yet thus much they partake of the nature of accessories*, that the indictment must be special of the *procurement* and *receipt*, and not of the principal treason. If they are indicted by several indictments from the principal, they cannot be tried till the principal is convicted; if they are indicted in the same indictment with the principal, the jury must be charged to inquire first of the principal offender, and, if they find him guilty, then of the procurer or receiver; and if the principal be not guilty, then to acquit both; for says Lord Hale, though in the eye of the law they are all principals in treason, yet (in truth) *be, the procurer, or receiver*, is so far an accessory, that he cannot be guilty if the principal be innocent. He said, he admitted that in the case of Lady Alice Lisle, 4th State Trials, 130, no regard was paid to
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this doctrine, and it was without any foundation in law practised quite otherwise, but her attainder was afterwards reversed in parliament, and the act recites, among other hardships of her case— That she was by an “irregular and undue prosecution indicted and tried for harbouring and receiving John Hicks, a false traitor, *though the said John Hicks was not at the time of the trial attainted or convicted of any such crime.*” Mr. Justice Forster says, the same equitable rule holds in the case of a person indicted for inciting or procuring a treason of any kind, whether the offence be treason at common law or by statute; and therefore if Mr. Fitzgerald should be now put upon his trial, he could not help saying, in the words of the act which reversed the attainder of Lady Lisle, *that George Robert Fitzgerald would be by an irregular and undue prosecution tried for procuring and inciting Andrew Craig, and several others, to murder Mr. Mc. Donnell, although neither the said Andrew Craig nor any of the other principals were at the time of his trial convicted of any such crime.* The rule he had laid down holds in all treasons, as well by common law as by statute, but it may be said, that the stat. of 10 H. VII. c. 21. (if it make murder high treason, which he did not admit, *quoad* the offence, though it did *quoad* the punishment), distinguishes this case from the other general cases of treason which he had put.

The words of the act are, “If any person of malice premeditated, do flee or murder, or of the said malice provoke, or procure any other to flee or murder any of the king’s subjects, he shall be deemed a traitor, and attainted of high treason.”

It appeared clearly by this act of parliament, that the offence of the procurer has a necessary connection with, and dependance upon the guilt of the actor, and it is not like the case of high treason in compassing the death of the King, for in that branch of treason, if A advises B to kill the

the King; the very advice is an overt act of high treason, and it is the only case in the law, where the will is taken for the act—it is high treason to advise another to kill the King, although the advice is never complied with. But will the Attorney General contend, that a person can be found guilty of *procuring* a murder, unless a murder was actually committed in consequence of that procurement? He said therefore that the procurer never could be tried until that fact be established, not by surmise or loose suggestion, nor even by oral testimony; it must be established by the *conviction* of the person who commits the fact, if he is amenable to justice, or by outlawry if he absconds; and no argument could be drawn from the special penning of the act of Hen. VII. which says, if any person shall murder, or procure another to murder, he shall be deemed a traitor; for it is a clear rule of law, which is to be found 2 Haw. 314. and in Conyer's Case, Dyer 298. that wherever an act of parliament makes an offence treason or felony, it incidentally assumes all the qualities of treason or felony at common law; the same rules of equitable justice prevail in the mode of trial, and the act, by necessary implication, makes all the procurers traitors or felons, though not named under the same circumstances, which will make them such in treason or felony at common law; therefore, when the statute makes use of the words procurers, it does nothing more than the law would have implied, it is merely "*expressio eorum quae tacite insunt*," it is done in this and many other acts of parliament, *ex abundanti cautela*, can have no operation whatsoever to alter or change those equitable rules that prevail in the course and order of proceeding, against the accessorial and the principal traitor. He relied upon it, it did not make the procurement of a murder a distinct substantive independent act of treason—He said the guilt of the procurer had a necessary connection with and de-

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pendance upon the guilt of the person incited or procured to commit the murder—if the murder never was committed in consequence of the procurement, he relied upon it, the mere procurement or advice (though highly flagitious and criminal) would not make the procurer a traitor; and therefore the offence of the procurer is derived out of, and so far connected with the guilt of the principal who actually commits the murder, that the procurer cannot be a traitor, unless the principal doth, in consequence of the procurement commit the murder, and is a traitor also.—The offence of the procurer has a necessary connection with and dependance upon the guilt of the person procured, and it is not like the case of treason in compassing the death of the King, for the very act of advising another to kill the King, is an overt act of high treason, tho' no other act whatsoever is done towards the completion of his purpose. Several acts of parliament which make *offences* felony, go on, and also make the procurement a distinct independent felony; but was it ever said that a person could be indicted and tried for procuring the felony, until the principals were convicted?—Clearly not. Upon the whole, he conceived that Mr. Fitzgerald could not, consistent with the known rules of law and justice, be put upon his trial for procuring the murder, until the principals, who committed the fact, were first tried and convicted.

The *Lord Chief Baron* owned he had great difficulty upon his mind, particularly when he considered the absurdity that might follow—that the procurer might be tried to day and convicted, and the principal, who is charged to have committed the fact by his procurement, might be acquitted the next; and therefore he proposed to the Attorney General to consent to discharge the jury of Mr. Fitzgerald, and try the principal first.

Several gentlemen rising to speak on the same side with Mr. Stanley,

Mr. *Attorney General* said he had listened with Christian patience to the very long speech which had been made in support of the objection, and he now only desired to be heard for three minutes; The offence for which the prisoner is indicted, is made a distinct substantive treason by the act of the 10th Hen. VII. and therefore there was no colour of reason to compare this case to the case of an accessory before the fact to a felony. Nay, the act goes so far as to make the procuring the death of a subject in this kingdom tantamount to procuring the death of the king. So that a man indicted upon this branch of the statute stands as much in the light of a principal traitor as the man who actually commits the murder. It was objected, that if the statute had been silent upon this subject, that the man accused of procuring and inciting would, of necessity, in the eye of the law have been guilty of treason, inasmuch as the person actually committing the murder is declared to be a traitor. As the act is penned, he denied the assertion. The act does not declare the crime of murder generally to be high treason, but attaches the penalties of high treason upon the persons of those who shall be convicted of the offence.—And the words extending to procurers and inciters are precisely the same with the words applied to those who actually commit the murder. Suppose the party committing the murder to be an idiot or lunatic—suppose him not amenable—suppose he was killed in the affray—~~it~~ it is contended, that the man inciting or procuring the murder might not, in any of these instances, be tried upon that branch of the statute in which the prisoner is indicted? But where is the disadvantage resulting to the prisoner?—Will he not be allowed to justify the homicide? If he can I Will he not be allowed to go into proof, that no homicide was committed? And that too without the prejudice which would necessarily arise against him from the previous conviction of those who stand charged

charged with having committed the murder. But admitting for a moment that there is weight in the objection, can the prisoner be let into it at this stage of the trial? He has been given in charge to the Jury on this indictment. If this were an indictment at common law, could an accessory before the fact, after having been given in charge to the Jury, claim his privilege of not being tried till the principal was convicted?—Clearly not.—An accessory to a felony may object to being tried before the principal so convicted; but he may, if he think fit, waive this privilege. And if he suffers himself to be given in charge to the Jury, he does in effect waive it—he cannot then be received to make the objection. As to his consenting to withdraw a Juror, he could not do it. He very well knew, if he were to give such a consent, it would be made the foundation of speeches infinitely longer than those they had heard that day—And, in truth, he did not feel that the objection had any weight.

The *Court* said they could not now let Mr. Fitzgerald's counsel into the objection.

Mr. *Calbeck* said he hoped he should be able to alter the opinion of the Court, and would, for that purpose, say nothing from himself, but only read from the Crown Law of Sir Michael Foster a small passage.

The *Court* could not hear him.—They desired to be shewn if they discharged a Juror, that there would be no objection.

Mr. *Stanley* said he was much surprised indeed to hear cases quoted by the Attorney General, which could not by any possibility be tortured into the smallest analogy with the present. The cases of the madman, idiot, and the infant, put by the Attorney General, did not apply; for in those cases the procurer is the principal, and the only prin-

principal—the idiot, madman, and infant, are the innocent instruments of his guilt, and are guilty of no crime whatsoever. The settled rule of law is this: That wherever a man procures a murder to be committed, and is absent at the time it is committed, and no other person but himself can be adjudged a principal in it, he shall be esteemed as much a principal as if he had been present. Upon this ground it is, that if A, intending to poison B, deliver poison to C, who knows nothing of the matter, to be by him delivered to B; and B and C innocently deliver it accordingly, in the absence of A; or if one incite a madman to kill another, who afterwards kills him in the absence of the person who incited him; in all these, and the like cases, the procurer is as much a principal as if he had been present when it was done; he is the only person criminal; the others are only the instruments of death, and have no share whatever in his guilt.—Is that like the case of a man of sound discretion and understanding, who commits a murder by the procurement of another? But he owned his astonishment was increased indeed, when he heard his Majesty's Attorney General avow from the bar, that Mr. Fitzgerald voluntarily waved that privilege to which he was by law intitled—that he consented to be tried before the principals. He appealed to the Attorney General's candour, whether he would avail himself of such an advantage?—whether Counsel for Mr. Fitzgerald had not declared before the Jury was sworn, that he would object to Mr. Fitzgerald's being tried upon the indictment for procuring the murder?—He did not object to the Jury being sworn, because there was another indictment against Mr. Fitzgerald, as a principal actually committing the murder, upon which he might have been tried: and therefore he hoped the Attorney General would not insist upon drawing Mr. Fitzgerald into a consent

sent which neither he or his counsel ever did give or meant to accede to.

Mr. *Attorney General* then declared that he would not accede to the proposition of discharging the Jury.

Mr. *Stanley* then said, since he had no hopes of succeeding, or deriving any advantage from the candour of the *Attorney General*, he would apply himself to the justice of the Court.—

The Court will not, upon this occasion, forget that noble declaration of the law, That the Judges are to be Counsel for the prisoner in all capital cases—to see that the proceedings against him are strict and regular—and that he is not deluded or drawn into a consent manifestly wrong, and to his prejudice. A prisoner in a capital case, is not *sui juris*, he ought not to have been drawn into any consent at all. If a prisoner in a capital case confesses the indictment, the Judges will not record his confession, but advise him to plead, Not Guilty. And therefore the justice of the case is a sufficient warrant for the Court to discharge the Jury, without the consent of the *Attorney General*; the old notion, that a Jury once charged in a capital case, could never be discharged, is now exploded. In *Kinloch's Case* in Mr. *Forster's Report*, there the Jury were discharged after the prisoner pleaded Not Guilty, in order to allow the prisoner a legal advantage which he had lost. He afterwards pleaded to the jurisdiction of the Court; that plea was over-ruled. The prisoner afterwards pleaded Not Guilty, and was convicted. And afterwards it was moved, in arrest of judgment, that a Jury had been sworn and charged, and even afterwards discharged—And therefore it was a mistrial. But all the Judges of England, except one, held, that a Jury might be discharged, in order to allow a prisoner the benefit of a legal advantage. And although a Jury never could be discharged for arbitrary and unconstitutional purposes, as was the

the case of Whitebread and Fenwick: yet when the great ends of public justice require it, it may and often has been done. In the case of the King against Daly, at Roscommon assizes, the jury were discharged without the consent of the counsel for the Crown, and without the consent of the prisoner, he was tried for murder. There was a material variance between the evidence and the indictment, as to the kind of death. The judge discharged the jury after evidence given on both sides, and sent up a new bill of indictment against Daly, upon which he was afterwards convicted before Mr. Justice Kelly. Mr. Stanley himself had, in that case, moved an arrest of judgment, because the jury were discharged after evidence gone thro' and concluded. And contended, that though there were cases where it had been done, where no evidence at all had been given with the consent of the prisoner, and in order to extend a legal advantage and benefit to him, yet that it was illegal to do so after evidence on both sides was concluded. But a majority of the judges of Ireland agreed, that the jury were properly discharged, and the prisoner was hanged upon the authority of those cases. He trusted the Court would discharge the jury, and not suffer the Attorney General to avail himself of such an advantage on the unfortunate gentleman at the bar.

Mr. Calberk said, that the doctrine was so strongly laid down in Sir Michael Forster's Reports, page 342, 343, that he should only read it to the Court.

Here the Court interrupted Mr. Calbeck, and Baron Power said, if he were to give an opinion at all, he thought he could tell to what the passage

in Forster alluded.—But whether they may take advantage of the mode of proceeding, in evidence or by motion in arrest of judgment, he was not to direct.

Lord Chief Baron. When the indictment was formerly read at the assizes, Mr. Stanley then objected to it, and he talked of demurring; and he was directed then by the Court to *demur* or *plead*; and on consideration he pleaded.

Mr. Stanley then said he did not offer to demur, he only said it was possible the prisoner might demur, after having before pleaded to an indictment for the same fact.—He was not so ignorant indeed, that he did not know that he could not benefit himself by a plea of *Auterfor's* Arraignment.

Court. The objection is, that in treason the accessorial traitor may object to being tried before the principal. If there be any thing in the objection, a mode has been proposed, and it has been declined by the Attorney General—the trial must therefore proceed.

Mr. St. George Daly opened the indictment.—*Mr. Attorney General* stated the case.

The first witness on behalf of the prosecution, Mr.

Andrew Gallagher, examined by Mr. O'Hara.

He knew Patrick Randall Mc. Donnell and Charles Hipson. They are dead. He was in company with them, on the 20th day of February last, between 7 and 8 o'clock in the morning, at Mr. Mc. Donnell's lodgings in Castlebar; they proceeded to Liberty-hall—Chancery-hall was the former name of it.—They went there by Breafe and Minola—that is a round—by Turlough, Liberty-hall is only
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five miles from Castlebar—by the other way it is eight miles—it is three miles further—the reason of going that way was, because they dare not go by Turlough. Mc.Donnell had not gone that way for half a year before but once or twice. They dreaded they would be shot at if they passed by Turlough. They arrived at Liberty-hall, and staid better than an hour. They were for returning home, but immediately before they set out, they sent some people to watch, lest they should be surprised. About 12 o'clock the witness urged Mc.Donnell to come away, lest they should be overtaken. When they had come within about a hundred yards of Ballyvarry, they saw two men of Mc.Donnell's running to overtake them. They stopped to meet these men—they were told by the men, that a party of about a hundred men in arms were about Mr. Mc.Donnell's house, and as they had not found him, they were going to set fire to the house. Mc.Donnell said, it was hard he should lose his house, and that it was probable there were people before as well as behind. The witness proposed they should go round near Swineford, and take shelter at Mr. Ormsby's, or some other persons; that they were well mounted, and could go on the hill, and see what they were doing. They went on the hill, and when they came there, they saw a great number of people—some of them said they saw Mr. Fitzgerald on horseback—the witness did not see him then, but perceived that they were surrounded. They returned towards Killeen. They saw a number of men in arms on foot, and Mr. Fitzgerald and two others on horseback. These men began to run towards them, and the witness and his party galloped at a great rate to Ballyvarra. The witness pressed to get to Foxford—Mc.Donnell said no,

they were too many to do any mischief. He and his party would stay in that little town of Ballyvarra. They went into a large house there belonging to Mr. Browne. The witness went up stairs, and saw Mr. Fitzgerald from the window. He rode off at the head of one party, and the other party got round the house. The witness then perceived Mr. Fitzgerald coming up, till he was hid behind the stables, which are in the front of the house. Some of the men came up near the house, others not so near. He saw James Masterson—he was a long time acquainted with him. Masterson put up his gun and fired at a middle sash where the witness was looking, the ball passed within a very small distance of his face—two other guns were immediately fired by two others, one was charged with swan drops and a ball. He did not know any of the others who fired—there were several other shots fired. The stable is about 30 yards from the house. He saw Mr. Fitzgerald there; he knew him though he was disguised in a large frieze coat—he was well mounted. The witness asked from the window what they wanted—he was answered by David Saltry, whose voice he perfectly knew, that they wanted Mc. Donnell, Hipson, and the two Galaghers. The witness said, it was the first time he had heard any such thing; if they had warrants, they might stop from firing, and he would give himself up. They stopped from firing, and for a moment or two desisted from forcing the door which they had been breaking. There was no body near the witness but one Mr. Crofton, a priest, who was hearing confessions. The witness went into a little room where Mc. Donnell was—there was a parcel of malt there—he said, “It is your life they want, Mc. Donnell, hide yourself in the malt.” —He

—He accordingly laid himself down in the malt, and the witness covered him with the malt. The witness was then going down, but before he had got down, the party had broken in the lower panels of the door, and some of them had got in. The witness called to send up the constable, and he would give himself up, for he was afraid to go down. John Fulton came up, and the witness gave himself up, thinking him a constable—when he came down, a number came round, and among the rest, one John Mc. Mullen, who was going to strike him, but John Fulton said, do not ill use the gentleman, he is very quiet. The witness called to Hipson to give himself up, and he did so. The witness went down among a large party, and Mr. Fitzgerald got into their view. Foy abused the witness—he had a stick in his hand, and made an offer of the stick towards Mr. Fitzgerald, who then wheeled out of the witness's view. The offer which Foy made with the stick, was a signal—Mr. Fitzgerald retired behind the stables, though not close behind them, yet hid from their view. Mr. Mc. Donnell, as he believed, was hid in the malt. The witness said he was gone off. When Hipson came down, Mr. Fitzgerald came gallopping to them. He had a switch stick in his hand, and by his side a short gun. The party huzza'd in joy, that they had taken the witness and Hipson. Mr. Fitzgerald ordered them to be tied together, and said, "he would take care to settle us." A party then came down in great triumph with Mc. Donnell, and a shout was continued for about ten minutes—Mr. Fitzgerald did not join in the shout, but he seemed well pleased. When they cried, long life to Colonel Fitzgerald, he, Mr. Fitzgerald, said, "very well—tie him—tie him." Foy tied Mc. Donnell to the witness's left arm, so tight, that

Mc. Donnell

Mc. Donnell cried to be loosed; and Foy said, "he would tie him till the blood gushed from him."

Mr. Calbeck. Foy's conduct is nothing to Mr. Fitzgerald.

Court. Was he not tied by Mr. Fitzgerald's directions? Where was Mr. Fitzgerald?

Andrew Gallagher. He was within a yard of Mc. Donnell. The witness asked to see the constable; they answered, that they had a constable and a warrant, but they would not shew it.—This was before Mc. Donnell was brought down, and before that he had begged to be brought before a magistrate. They said, they would bring the witness to Sligo. He answered, he was very well satisfied, he had some friends there, who would go bail for him. When Mc. Donnell was tying, Mr. Fitzgerald held his switch over him, and said, "Damn you, you cowardly rascal, I long have wished to have a shot at you, but I have you now, and shall take care to punish you." He also insulted Hipson—he said, "he had something against him, and would take care to punish him." Mc. Donnell asked to see the warrant. Foy or Fulton shewed some paper, but would not let him look at it.—He asked to know the crime with which they were charged. He, Mc. Donnell, asked to be brought before a magistrate—it was then only four o'clock—Collector Browne and Mr. Bolingbroke were at General O'Donnell's—they could be there in half an hour with ease, if permitted to ride. Mr. Fitzgerald said, "he'd think of it," but immediately after ordered them to be brought to Turlough, and said, "he had them, and would take care of them."—They were made

made to walk through a ford. Mr. Lemon, a priest, was brought out and tied to M'Donnell. While he, Lemon, was tying, the witness told M'Mullen, who was tying him, that "he was a desperate looking man, and he could have no luck for his meddling with the clergy." Lemon was not long tied. The witness told Mr. Fitzgerald, that the priest "had done nothing."—Mr. Fitzgerald said, "he, the priest, was a great rogue"—the witness told him, there was another priest in the house hearing confessions; and on his being brought out, Mr. Fitzgerald then ordered Lemon, the priest, to be unbound—he did this at the intreaties of his own party. Mr. Fitzgerald and his party were debating, and delayed in consulting until it grew night fall. Mr. Fitzgerald, Andrew Craig, and Robinson, consulted together. One time it was determined to bring them to Mr. Bolingbroke's; another time to Turlough, for as it was late they might be rescued. They were all tied together, until it was found that M'Donnell could not walk, from a wound in the calf of his leg. Their horses were then brought, but Mr. Fitzgerald, on seeing them, said, they were too good horses, and ordered that Hipson and the witness should walk, and M'Donnell ride. M'Donnell was then set at liberty—he meant by at liberty, loose; and Hipson and the witness were again tied. Two men led M'Donnell's horse—afterwards Andrew Creagh, who was on horse-back, led it.—It was then nearly dark—there were between two and three hundred men, who almost all had guns. The witness, and M'Donnell, and Hipson, had received very ill usage. He, the witness, begged to get a drink of water. He had not breakfasted.—He was told No.—and Fulton said, "Damn them, drive them on." They were compelled to wade through
a stream,

a stream, and the witness stooped and took a drink out of it in the palm of his hand. Mr. Fitzgerald was at the head of the party. They were brought to the house of Turlough. It was debated what to do with them. One Robinson seemed to have great influence over Mr. Fitzgerald. Upon his advice it was determined to let them stay till morning. They required to see the warrant. Mr. Fitzgerald then brought in a bundle of papers, which he called warrants, and called in a man of the name of Fulton, who having come in, Mr. Fitzgerald said, "There is your warrant, and there is your prisoners." This was in about a quarter of an hour after they had come to the house of Turlough. M'Donnell begged to see the warrants. Mr. Fitzgerald said, "No, you will see them time enough." Mr. Fitzgerald staid some time in the parlour, and then went down from them. In about an hour after he had ordered them to be brought up stairs, they were brought into a small room on the stair-head; four men were with them; they were intended as a guard on them. There was a fire and a piece of candle in the room. The witness sat on a short little form, which contained two of them. Mr. Fitzgerald did not come up until the fire was lighted. Scott, one of Fitzgerald's servants, came up, and told M'Donnell he was sorry to see him—he could bring him a bed to stretch on; or wine and water. He brought up a bed. Mr. Fitzgerald came into the room; the witness and Hipson were sitting on the form; they had laid a bolster, which came up with the bed, on the form. Mr. Fitzgerald offered to bring M'Donnell any thing he should chuse, and to taste it before him;—"but as for these vagabonds, (meaning Hipson and the witness) how dare they have

have such a soft seat?"—and ordered the bolster to be taken from them. Mr. Fitzgerald then went down, and the witness saw him no more that night. He heard him very frequently. He heard him call several people by their names, as a serjeant calls men on a parade; and he heard the men drink his health. Afterwards a party came up to relieve the guard, and they regularly relieved each other. They remained prisoners all night. Mr. McDonnell slept some time. The witness wakened him. The witness never had slept at all. Hipson had slept a little. The witness said it would soon be day. There was a pane broke in the window, which obliged the witness to shut the shutters; he was obliged frequently to shut them from the cold. He heard Mr. Fitzgerald call Scott—and call the roll, as he had heard it before; and he heard them drink as before; this was about five o'clock in the morning; the day near clearing. The window is not immediately over the hall-door; it is above it, on one side of it. At day he saw a number of men regularly drawn up, to the number of twenty or thirty. He saw Andrew Creagh and James Foy settling them. Mr. Fitzgerald and Mr. Brecknock came to the flag of the hall-door; through the broken pane he heard them conversing; they spoke in French, afterwards in English, but he could not hear what they said, but the names of himself, McDonnell, and Hipson were severally mentioned. He heard at that time nothing more than their names. Mr. Fitzgerald called over James Foy and Andrew Creagh, who were settling the guard, and ordered them to move a little higher, about ten or twelve yards above the house. There was some other conversation, which he did not hear. As soon as the guard were set-

led,

tled, Mr. Fitzgerald gave them, Foy and Creagh, orders, "*If they saw any rescue, or colour of a rescue, be sure they shoot the prisoners, and take care of them.*"

[By the direction of the Court, Gallagher repeated this last part of his testimony; and at the desire of one of the Jury repeated it a third time.]

When these orders were given, Mr. Fitzgerald said to Mr. Brecknock, "Ha! we shall soon get rid of them now;" and Mr. Brecknock replied, "Oh, then we shall be easy indeed." After the guard was settled, Mr. Fitzgerald called back Andrew Creagh, and when Creagh came within about ten yards of him, he, Mr. Fitzgerald, said, "Andrew, be sure you kill them—Do not let one of the villains escape." Andrew answered, "Oh, never fear, please your honour." There was nobody then with the witness, McDonnell, and Hipson, but Fulton. A man came up to the witness and said, he was sent by Mr. Fitzgerald's directions for Fulton; Fulton went away, and the man staid with him. The witness went out again, and saw Mr. Fitzgerald and Brecknock along with him. Fulton then returned, and said, "You must be tied and brought off to a magistrate." It was then a few minutes before seven o'clock, for they were brought down exactly at seven by his watch. Hipson's right arm was tied to his left one, by a small kind of cord which the weavers call trums. McDonnell said it was hard to be so near Castlebar, and not to be brought there. He desired to know where he was to go to. Mr. Fitzgerald said, he would soon know that—the constable had directions. Mr. McDonnell was put on horseback, one John Murphy leading his horse by the head; Murphy had the bridle in his left, and a sword in his right hand. The guards were in fours and fives; there

there were four or five of them before the witness, Mr. Mc. Donnell immediately behind the witness. He knew of the guard John M'Mullen, John Fulton, William Fulton, one Uing or Ewing, one Wallace Kelly, William Kelly, and Andrew Creagh. James Foy left the house at Turlough with them. He did not know whether Foy continued with them or not. James Masterfon was not with them. One David Simpson was of the guard. They had not gone above fifty or sixty yards from the house of Turlough when he heard Mr. Fitzgerald cry Hollo. He saw James Foy then follow them. The witness had thrown his eyes constantly about him. He heard Craig order the guard to halt. James Foy then came up from conversing with Mr. Fitzgerald, and spoke with Craig for near five minutes. Foy walked with them. The witness cannot tell how far. The guard walked on with the witness, Mc. Donnell, and Hipson, for about four hundred yards from the house at Turlough, till they came to a place called Gurthnefulla. The witness was very watchful in consequence of the direction he had heard Mr. Fitzgerald give. From the time of the witness's quitting the house at Turlough, he had been sure of death. He looked towards the rear, and saw them in motion, and heard a shot, which from his confusion, he thought to be fired by one of the rear guard. And he was still fully sure it was one of the rear guard—Before he had seen this shot, he saw Andrew Craig shove a person, and he believes the person whom Craig shoved was the person who fired that shot. He heard the shot immediately after seeing Craig give the shove. And he then heard Andrew Craig say, There is a shot. They are rescuing. Shoot them. Immediately then he saw a second shot fired from

from the rear guard

from the rear. He then threw up his eyes towards Mc. Donnell, and saw his mare working as if from the noise. His arm was waving as if broken. He then saw another shot fired at Hipson, which hit him in the left side, and passed through his body. And he believes by the fall, Hipson broke the chord which tied the witness and him together. He could not be sure who fired that shot, but thinks it was a tall man whose face he did not know. A man within about half a foot of him presented his piece at him. And he saw a shot come from the rear guard and hit that man, and wound him, and the man's piece then went off, and wounded the witness in his arm, and passed along his coat. Three or four more shots were fired at the witness and Mc. Donnell. He still kept looking at Mc. Donnell. He saw Murphy struggling with the mare on which Mc. Donnell rode. He turned Mc. Donnell's breast to the party. The mare plunged and Murphy was thrown down. Mc. Donnell then galloped off, crying murder, and for mercy. The witness ran off after him for forty yards or thereabout. Some of the party cried out, "God damn their souls, they are escaping, why do you not shoot them?" There were several shots fired at the witness in the forty yards that he ran. One of the shots was very remarkable. He was sure it was from the blunderbuss, from the manner in which the road was torn up. The witness threw himself into a ditch with his heels uppermost, and lay as if dead. He saw the party pursuing Mc. Donnell and swearing most shocking oaths, they will escape. When he thought they were all gone by him, he looked about him in hopes to escape through the fields. He crept over the wall in as low a manner as he could. He saw some of the party round

round Hipflon. He saw Cox and Masterfon there, and a man on a grey horse. The witness thought to get down to the water and escape by swimming. He saw Richy Law on Mc. Donnell's horse. Law cried out, O you may now return, for by God he is dead in earnest. The next person he saw was one Huston, who used the same words. Some more of them returned and asked where the fellow with the blue coat was. The witness wore a blue coat. By God, says Saltry, here he fell into this bush, and if he had not life he could not move. They then leaped over the wall, and some of them leaped over the witness, but the attention of one of them being brought back to the road, he saw the witness, which as soon as the witness perceived, he begged his life. The witness was then brought to the road. William Fulton, who had a blunderbuss in his hand, was for putting the witness to death; the witness begged of Huston to protect his life, who said he could not interfere, and rode off from him to the House of Turlough. He spoke in extremely moving terms to the guard; some of them pitied him, others insisted upon his going to the house at Turlough, and he went back there against his will; as he went, the witness slipped himself before Cox, so as to save himself from being shot from behind. As he came towards Mr. Fitzgerald, he saw Huston gallop off towards Castlebar; when he came up to Mr. Fitzgerald, he fell upon his knees, and begged to be spared for the sake of his long family. Mr. Fitzgerald bid the witness get up, for "I may be moved, leave off your womanish tricks." When the witness was brought into the parlour, he saw Mc. Connell, the man who was wounded, and who shot at and wounded the witness, and somebody taking down what Mc. Connell said. They stopped, and Mc. Connell

blow

Gonnell was taken up stairs.—Mr. Brecknock said in Mr. Fitzgerald's presence, that this was a very heinous affair; that the witness could be punished for being guilty of so heinous a circumstance as a rescue.—Mr. Fitzgerald said he had sent for a surgeon, Mr. Lindsey, and for a coroner; the surgeon to look at the man that was wounded, and at his, the witness's arm.—Mr. Fitzgerald then went out and shortly after returned. There was a kettle in the room. Mr. Fitzgerald said to the witness, he had better drink something—by the smell, the liquor was whiskey. Mr. Fitzgerald brought it down—he heard Mr. Fitzgerald's health drank.—Mr. Fitzgerald returned, and asked the witness, would he dress his arm himself? the witness said, "No," he would wait until the surgeon came, as he had no things to dress himself, and it would put him to double pain. Fitzgerald and Brecknock went out and chattered in French; they returned, and several of the party came in, and shewed several of the places where they were wounded. Mr. Fitzgerald said, this is a very unfortunate affair, see what they have got by it, they have killed their own party, and hurt none but the unfortunate man above stairs—the witness assented to every thing they said. Mr. Brecknock said to the witness, "You are as guilty as if you had a gun, and rescued yourself." Scott had brought some water for the man who was wounded, and the witness drank of it, and also some wine and water, after he had seen Mr. Fitzgerald drink—he saw Scotch Andrew coming up on a mare towards Turlough; the mare was the same which had been met by the witness when he was brought prisoner to Turlough—he heard Andrew singing a song, and crying "How are you lads? high for the bloody North for ever." Mr. Fitzgerald said he
 would

would send for Mr. Baynes; he afterwards said, he had got a note from Mr. Baynes, that he was ill; he desired the witness to write a note to his brother, which the witness did not, but said he would write a note to his wife to make her easy—Mr. Fitzgerald said he would send it by a woman to Castlebar. Mr. Fitzgerald and he had many conversations: the witness flattered Mr. Fitzgerald, and told him he wished him to be his friend, for there was no man of spirit in the county but himself, meaning Mr. Fitzgerald; and the witness said, he loved a man of spirit. Mr. Fitzgerald then gave him his honour that he would not prosecute him, and that, when the magistrate came, he would himself be bail for him; and if, as he believed, it was not a bailable offence, if the magistrate would not take bail, he would contrive to let the witness escape. Neither the witness, nor Mc. Donnell, nor Hipson, had any arms, nor could they have had any without his knowledge; nor did any person whatsoever make any opposition to their being taken before a magistrate.

He was cross examined by Mr. Calbeck.

Hipson had a gun when he left Castlebar; he gave it to one of the servants at Mr. Mc. Donnell's. Hipson was a shoemaker; he had been formerly a dragoon. Mr. Fitzgerald said he would send a woman to Castlebar, because he might naturally suppose, that some ill usage would happen to his people from the conduct of that day. He frequently saw Mr. Fitzgerald's people in Castlebar, and he was sure that not two days before this affair, Mr. Fitzgerald's people would not suffer any injury at Castlebar. The witness shut the doors of the house of Ballyvarra; no shots ever were fired out

out of the house; Mr. Fitzgerald's gun was not discharged there. They consulted at one time to take them before Bollingbroke. He believes he never heard a word of a man of the name of Murphy having sworn examinations against them. He could form no belief whether any such examinations were sworn. He had heard afterwards that such examinations were sworn, but could not tell whether there were or not, not having seen them; he could form a belief of a fact not within his own knowledge, when a man of truth told him it, but not when he was told by persons as insignificant as himself. He believes that examinations were sworn against him before a magistrate, and does not know but there might be warrants upon them. The reason that was given for their not going to Mr. Bollingbroke's, as it was too late, was not given until after they were brought to Turlough. The witness, nor Mc. Donnell, nor Hipson, did not agree to go to Turlough. The party said they would bring them to a magistrate, but did not name Mr. Bollingbroke at Turlough. Robinson was against their going that night. There was a centinel always upon them (Mr. Donnell, Hipson, and the witness). The centinel was not Foy—Fulton, Newing, or Ewing, and Wallace Kelly were centinels. Fulton was in the room, and did not hinder the witness from looking out of the window. His face was to the place of the pane; he could see as well, but not hear as well, as if the window were up. He saw Mr. Fitzgerald perfectly, because there was a little porch outside of the door, and he stood outside of the porch; the window was at one side of the porch; the wall of the porch could not cover Mr. Fitzgerald from his view, his situation prevented it from covering him. The witness

witness could not tell whether Mr. Fitzgerald's party were disciplined, he never saw them perform the manual, or go through any manœuvres; several of them saw him looking from the window, they did not perceive it to be of any consequence, whether he looked or not. The only reason he could give for his safety was, that the providence of God was greater than their power. He knew that persons could be concealed behind the walls, but he did not believe that there were persons there for the purpose of rescuing him, Mr. Mc. Donnell, or Hipson. Mr. Fitzgerald did give him wine and water. The word *settled* made use of by Mr. Fitzgerald might mean *to punish them by law*, but he did not believe that was Mr. Fitzgerald's meaning. He believed, that the case which Mr. Fitzgerald said was not bailable was the murder which happened in consequence of the rescue. He saw a great mob come to Mr. Fitzgerald's house, but he did not see chairs or tables broken, or the house dismantled; but he saw doors broken. He himself was then safe. He remembers seeing Mr. Ellison at Turlough. He could not recollect the people who came to liberate him. He himself helped to look for Mr. Fitzgerald. There was a charge against him of a capital crime, but he did not believe that Mr. Fitzgerald could identify him. By the virtue of his oath the charge against him had no more effect upon him, than if there had been no sort of prosecution against him; nor can he form any belief whether any person could prove his being present at the affray in the Gaol.

To a question from one of the jurors.

He answered, it was impossible for them to procure any person to rescue them, for they were not permitted to speak to any person.

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To a question from the Court,

He answered, that the party were taking the prisoners towards Sligo ; and from Castlebar to Turlough, is three miles.

The Second Witness for the Prosecution, W. Kelly, examined by Mr. Patterson.

The witness lived in February last in Turlough, the estate of George Robert Fitzgerald. James Foy came to him on the 20th of February last, and delivered a message to the witness, that Mr. Fitzgerald wanted a word with him. He went to Turlough, and saw Mr. Fitzgerald. He saw him in his own parlour; there were ten or twelve people with him. There were fire-arms, guns and blunderbusses, in the room with him. Mr. Fitzgerald told the witness, that he had a warrant for Patrick Randall Mc. Donnell, Charles Hipson, and the two Gallaghers. He desired them to go to Mr. Mc. Donnell's house, and take them prisoners, and if they saw them in the house to break it open, for the warrants allowed it; and if they made their escape or fled, to be sure to shoot them. Before they set out, each man got a glass of spirits in the parlour. They left Mr. Fitzgerald in the house of Turlough. He saw Mr. Fitzgerald next in Ballyvarry. Before he reached Ballyvarry, he heard many shots. Mr. Mc. Donnell, Charles Hipson, and Andrew Gallagher were in custody of Mr. Fitzgerald's men when the witness came up. They were tied by Mr. Fitzgerald's directions; Hipson and Gallagher were tied, and at first Mr. Mc. Donnell; but he was afterwards loosed and put on his horse. Mr. Fitzgerald did nothing, but said he was fond that he had them in custody. He cannot tell what

what time they came into Turlough; they were there all night, they were sent away between seven and eight in the morning—he was a stranger in the place, and did not know many of them. John Fulton, William Fulton, Andrew Craig, and David Simpson were of the guard. Andrew Craig told him, he, the witness, was to be put in the front of the guard, and bid him not to look behind, or regard what passed, but go strait forward. Before they set out, they received directions to go to Mr. Bollingbroke's, and Mr. Fitzgerald told them, that if any *operation* or rescue happened, to shoot the prisoners. At about a quarter of a mile from Mr. Fitzgerald's, a man next to him, one Mc. Connell, said he heard a shot or two, and the witness heard Craig cry a *rescue*—The witness heard two shots more. He turned about, and saw Craig and Fulton fire, and saw Gallagher and Hipson fall, and James Mc. Connell fell also. He saw Mc. Donnell coming by him on the left hand side of the road, crying Murder! save my life! and Craig cried he would have his life. He saw Mc. Donnell stopped by a man with a hatchet; and saw Craig pursue him. A young man had hold of the mare, and Knox's boy brought him (Mc. Donnell) a drink of water in a noggin, and then went into Knox's house to get him assistance. Craig then came up, and presented his piece at Mc. Donnell, and the witness cried Murder! Andrew, don't hurt the Gentleman more. Craig then swore he would drive the contents through his soul, and fired the contents at him. Mc. Donnell did not live fifteen minutes. Craig said, "Long he has deserved that." The arm that was next to Andrew was not broken before the shot. After the shot it appeared to be broken.

There was no man on the road but their own party.

He was cross-examined by Mr. Burke.

He thought he was going to do a legal act—He went innocently—One Hogan took him prisoner—He thought it was better for him to turn, than to let innocent people suffer. He did not swear to save his life—Nobody had ever told him, that unless he told the truth, he would be hanged—He never remembers to have said to Moran, the Gaoler, that Mr. Fitzgerald was a good master.

To a Question put by one of the Jurors, he said,

That Mr. Mc. Donnell's arm, when he saw him at the Bridge of Kilnacarra, did not appear to be broken before Craig shot at him.

Third Witness for the Prosecution, Andrew Craig.

Examined by Mr. Attorney General.

He lived on the 20th of Feb. with Mr. Fitzgerald. He was sent by Mr. Fitzgerald, on the day before Mc. Donnell was shot last, to collect some men, the Tenants. He, Mr. Fitzgerald, wanted them to take Mc. Donnell, Andrew Gallagher, and Charles Hipson. He did collect them; and Mr. Fitzgerald's steward gave them some whiskey. Mr. Fitzgerald desired them to take them, Mc. Donnell, Gallagher, and Hipson, *at the peril of their lives, let the consequence be what it would.* Mr. Fitzgerald called to the witness and spoke to him. He desired the witness to tell Fulton and Mc. Mullen to shoot the prisoners in the taking, and when they were shot to bring in all their arms; and not to break the
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the House, for it would be a good House for a Minister. *Not to make a botched job of it, as it had often been before,* for he, (Fitzgerald himself,) would go and shoot him, (M^c Donnell,) through the center of the heart, but that he must stand clear to save Fulton and M^c Mullen. They went to M^c Donnell's, and found he had been there. There were two common men in the House. They took seven or eight guns from it, and went to the bridge, from whence they saw M^c Donnell, Andrew Gallagher, and Hipson, on a hill. The men were for going down to take them. The witness bid them come back. Some of the party asked him if he had natural feeling, or was he a coward? The witness sent a messenger to Mr. Fitzgerald, and told him he would go to Breasy. Mr. Fitzgerald was not at Turlough. The witness understood that Mr. Fitzgerald was gone another way in search of them. The witness went home to get a horse. He received a message that M^c Donnell and his party were *pinned* at Ballyvarry. He set off, and found them; and Foy said, now we are joined, whoever has a mind not to assist, let him lay down his arms. Seven or eight shots were then fired at the House of Ballyvarry. Mr. Fitzgerald was about 200 yards off, in a hollow, in disguise, in a common man's coat. There was no body with him but Scott. After the shots, a message came up from Mr. Fitzgerald, to know what they were doing. The constable, and others, then broke the doors open, went in and took M^c Donnell, Gallagher, and Hipson. M^c Donnell asked to be brought before a Justice. M^c Donnell was not tied, he rode upon his own mare. Before they went to the house at Turlough, Mr. Fitzgerald took

took the witness aside, and said, they had better take them to Mr. Bollingbroke's, and shoot them by the way; that it was a very bad managed job that they had not been shot in the taking. The witness said it might be better managed by taking them to Turlough; and Mr. Fitzgerald consented. The witness begged, as a favour to himself, to be permitted to turn Gallagher away. Mr. Fitzgerald parted from them when they came to the House at Turlough. John Chawner sent for the witness, and desired him to call for his master. They met in the garden at Turlough with Chawner. Mr. Fitzgerald mentioned to the witness to send the prisoners out *upon sight*, that is, that minute, that Chawner might shoot them. The witness was desired to look for Chawner's former gun. He searched for and found it; and Chawner loaded it with a brace of bullets. It was agreed to send them out directly. Chawner was to shoot Mc. Donnell. Fulton and Mullen to shoot the other two. When the witness was almost leaving them, he spoke for saving Gallagher. Chawner agreed, and mentioned it two or three times; to which Mr. Fitzgerald answered, *No, shoot the covey; the covey! dead dogs tell no tales!* Chawner was in the hay-yard waiting for them to come out. Chawner proposed to shoot them up stairs; and to pretend they had attempted to escape. At twelve o'clock at night, he wanted to have the prisoners sent out, that he might shoot them. The witness went into the room where the prisoners were, and, having turned out the guard, desired Gallagher, Mc. Donnell, and Hipson, let what would happen, to keep silent; Mc. Donnell thanked him; and the witness said, a shut mouth makes a wise ———, and he pointed

pointed with his finger to his head. In the morning the witness called up Mr. Fitzgerald, who bid him select twenty of the most active men amongst the tenants. He did so, and brought them to the hall, where spirits of whiskey were given to them. Mr. Fitzgerald told him the affair was managed badly, that they were not let to go last night; the country would be up in arms, and his men would be shot;—but he had found a plan to have the prisoners shot like dogs. His plan was, first to charge a gun with two fingers and a half of powder, and seven fingers of small snipe shot; and then to send a man on with that, who should fire from the wall of the park, with directions to fire at and spare none. It would *smarten* them up to business; the party would think it a rescue, and the small shot would not damage them. Mr. Fitzgerald called in the witness; and Mr. Brecknock brought a law book. Mr. Brecknock pointed out a place in the book, and said, that was what he (Mr. Fitzgerald) wanted. Mr. Fitzgerald looked at the book, and said, or read in the book, that they were indicted for felony, and if any attempt was made to rescue them, it was lawful to shoot them. Mr. Fitzgerald desired him to go and move up the guard further, and deliver these directions to them, which the witness did. Mr. Fitzgerald desired the witness to go to Fulton, and tell him to shoot Mc. Donnell; and Mullen to shoot Hipson; and *he* would send Foy to shoot Andrew Gallagher. The witness answered, that if Foy went, he would not go; and said, that he, the witness, would get a man to shoot Andrew Gallagher. Shortly after, the witness asked Chambers, *would he kill a man for him?* Chambers answered, *he would not for his master's estate.*

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The witness said the charge in the piece, he would give him, would not kill a rat. The witness then drew it to shew him, and Chambers consented to go to Fulton and Mullen. As they went he desired Chambers not to tell them but he had a good charge. At the hall door Mr. Fitzgerald desired them *not to make a botched piece of work of it, as was often done before*, for Mr. Mc. Donnell and he could not live in the country together; and if Mc. Donnell was not shot, he would take his mare and quit the country. Mr. Fitzgerald desired the witness to go up and tie the prisoners. The witness said he would not; he never tied any man. None were tied but sheep-stealers and robbers. Hipson and Gallagher were tied together, and Mc. Donnell rode on his mare. Murphy led him. John Fulton, John Mullen, David Simpson, Kelly, Dorning, John Fohender, himself, and Murphy, were of the guard. Foy was sent after him when he was about two hundred yards from the house, with a message, that the witness had before talked of saving Andrew Gallagher; that he might as well let the whole escape,—that no such motion should be made. The witness called to the guard to shorten their step; but they did not mind him. A shot was fired about two or three hundred yards from the deer-park gate, by one of Mr. Fitzgerald's party. One Nelly, or Lelly, a clerk, who had drawn leases for Mr. Fitzgerald, fired that shot. That was the shot which was to *smart* the party up to business. The witness got directions before, when that shot was fired, to cry out a *rescue*, and he did so.—Hipson was shot by Mullen. Chambers fired.—One of the men of their own party had a spleen against another, and, as the witness supposes, took an opportunity,

portunity, and killed their own man. The witness saw Mc Donnell's mare rearing in Murphy's hand; his breast towards them.—Three of the party fired at him;—believes Fulton to be one of them; the shot took effect, for the witness saw one of his (Mc Donnell's) arms flinging as if broke. Mc Donnell fled towards Kilnacarra. The witness does not know whether he (Mc Donnell) was stopped or not. The witness went to a shoe-maker's house, and borrowed the shoe-maker's mare, and pursued Mc Donnell. The witness overtook him. Fired at him. He was shot dead.—The party left Gallagher behind. Some others of the party took Gallagher home to Turlough. Gallagher had got home before the witness. The witness met a man who had Mc Donnell's mare, whom he sent to know what was to be done with the dead bodies. The witness saw Mr. Fitzgerald, who said, they had made a *bad job* to leave Andrew Gallagher alive to hang them all; that must not be. Gallagher should be sent to a justice and shot on the road; the witness said he would not do it, they should kill him first. He (Gallagher) had made a penetrating speech, and if Mr. Fitzgerald did not pity him, to pity his wife and children, for his children would be fatherless, and his wife a widow. The witness at length settled with his master to send Gallagher to Huston's. The witness's reason for saving Gallagher was his friendship for him,—Gallagher had inoculated his children, and given them medicines. The witness knew of other attempts made upon Mr. Mc Donnell by Mr. Fitzgerald, one in particular immediately previous to the last affizes.

Mr. *Burke* objected to giving evidence of this kind, as Mr. Fitzgerald had been already indicted, tried for and acquitted of that offence.

The Court over-ruled the objection, declaring that a witness had a right to give evidence of every thing that shewed *Malice* in Mr. Fitzgerald.

Andrew Craig. The first attempt he knew of Mr. Fitzgerald, upon Mc Donnell, was shortly before the last assizes, on the day that Mc Donnell passed by the pound, and had a conversation with Mr. Fitzgerald. Shortly after Mr. Fitzgerald desired the witness to charge a musket with slugs, for he, Mr. Fitzgerald, wanted it to shoot otters; the witness did so, and then went to shoot magpies. When he returned he was asked by Mr. Fitzgerald if Mc Donnell had gone by—He told Mr. Fitzgerald he believed not. The witness then went into the scullery and drew the charge out of the musket he had loaded for Mr. Fitzgerald, and put in a little turf, and chewed paper instead of the balls. He went home to his own house in the evening, and found one of his children burnt. He returned to Mr. Fitzgerald's to get some white lead and oyl, to put to his child, and went to the hay-loft for that purpose. He heard the two Mc Donnells ride by, talking of peace and quietness. He saw a man from the corner of the house shoot at Mc Donnell; and he saw that man return to Mr. Fitzgerald, and heard Mr. Fitzgerald say to him, "Good night, my faithful friend Foy." When the witness came from the stables, Mr. Fitzgerald asked him what he had been doing? The witness said, he had come lest any thing was amiss amongst the horses. Mr. Fitzgerald asked him if he had heard a shot. The witness said not. When he came the next morning to Turlough, he was
asked

asked by Mr. Fitzgerald if he had heard any news. The witness said he had heard very bad news; that Mc Donnell was shot passing by the road three inches in his head. Mr. Fitzgerald said, Damn the drunken scoundrel, he had been hurt by some of his own party. Mr. Fitzgerald wanted the witness to swear that Mc Donnell had fired the first shot. The witness refused it, saying No, let the man who fired it swear. A ball happened to be found on the road, which was preserved, and some holes on the house shewn as marks of shooting. The next attempt he knew upon Mc Donnell was: He and Fulton were directed to go to Chancery Hall. They went there nine or ten times in order to shoot at Mc Donnell; one night that they went there three of the windows were open, and Fulton said, "Bad luck to you who left the windows open if you knew what we were about." Another night Fulton seemed very dull, he said his father had lost every thing by coming into that country, and if he (Fulton) did not shoot Mc Donnell, Mr. Fitzgerald would turn them off, but the witness would rather lose every thing than shoot at a man. The witness told him there was a way to settle all that, which was to fire in at the windows when nobody was in the room, and it would be talked of as an attempt upon Mc Donnell. Fulton did so, and the witness rode off and told Mr. Fitzgerald that there was bad news, that Fulton had fired into Mr. Mc Donnell's house, and the witness was afraid he was taken. Mr. Fitzgerald seemed rather to bemoan the loss of a gun and case of pistols, that Fulton had with him, than Fulton's being taken. He knew of another attempt on Mr. Mc Donnell. He (Fitzgerald) ordered him to go to Keellogues and shoot Mc Donnell out of a brogue-maker's

house. On another occasion he had directed Mullen and Fulton to shoot Mc Donnell. At one time when the witness objected to doing this kind of business, saying that he was a man who had a family, that he had a good character, and the affair would come to light, Mr Fitzgerald said since he was so delicate, to send Murphy to him, that he might send him to Capperary House where John Chawner was to bring Mc Donnell. Chawner lived with Mc Donnell as a sportsman. Chawner had formerly lived with Mr. Fitzgerald.

He was cross-examined by Mr. Owen.

It was since he came to gaol that he resolved to give evidence. He had made his escape. He was taken near Dublin. He could not tell how long since. Nobody prevailed with him to make his confession. He could not tell why he did not make it before he was taken. There was no message ever sent to him about it. He never had any conversation with the Attorney General. Never saw him but at the last affizes, and at Mr. Conolly's once hunting. No person ever spoke to him about confessing. Mr. Fitzgerald told him he had warrants. Brecknock pointed out the place in a law book. Mr. Fitzgerald said it was an act of parliament, and that it was lawful to shoot people when indicted for felony. The witness did not know whether they had a warrant or not. Mr. Fitzgerald appointed a place to shoot Mc Donnell and the other prisoners when the *rescue* shot, as he Mr. Fitzgerald called it, should be fired. The witness could have killed Gallagher himself, but he wished to keep his hands clean.—When upon other occasions he has had scruples, Mr. Fitzgerald had repeatedly told him,

him, that he ought to obey his Mr. Fitzgerald, his master's orders, and that no judge or jury would or could find him guilty for so doing. The witness had hopes of being saved on account of his evidence.

Fourth witness for the prosecution.

The Rev. Mr. ELLISON examined by Mr. DALY.

He took the information of Andrew Craig about a month ago. Before that he had taken his confession. The gaoler had told him Andrew Craig wished to see Mr. Cuff, James Brown and the witness, and would tell nothing till they all were together. Mr. Ormsby was present. Andrew confessed in much the same manner, that he had that day given evidence upon the table. He said, he hoped it would be for the good of his soul, and that he hoped Mr. Cuff would make interest for him. There was no promise whatsoever made him. Mr. Cuff told him, if his conduct deserved any mercy he would apply for him: but there was no promise whatsoever made. He took Mr. Thompson with him upon another occasion, that he might have a respectable witness. When Andrew swore the information there was no promise made to him.

He was cross-examined by Mr. Stanly.

Craig had made his confession before the affizes. One Heeny, a man of his (Craig's) own choosing, drew his confession. He had not returned his confession to the Clerk of the Crown. He had kept it till the Attorney General came to Castlebar, and then gave it to him; and the Attorney General afterwards

afterwards returned it to the witness. He had kept it ever since. He never had compared the confession and information, but from his memory they corresponded. The information was written by his Clerk. He left his Clerk to take down the information, in writing. The witness examined Craig over and over again by the written examinations. The witness apprehended Mr. Fitzgerald the day Mr. Mc Donnell was killed. He also apprehended Fulton. He did not examine him at the time of apprehending him. The gaoler went from the witness for the warrants, if Fulton had any, and brought a person to be witness of his conduct. The gaoler brought several papers (which the witness now produced); three of the warrants, he believes, were signed by Alexander O'Malley. He had seen his hand writing as a Justice of Peace. One of the warrants he was sure was the hand-writing of Mr. Bolingbroke. He was not sure whether the name William Fulton inserted in the warrants, was or was not Mr. Fitzgerald's hand-writing; but believed it to be his hand-writing.

Fifth Witness.

The Rev. Thomas Thompson examined by Mr. Blosset.

He knows Andrew Craig. He saw him in the gaol with Mr. Ellison, in company with the Gaoler and the Clerk, who took his deposition fairly. There were no promises made to him, he heard Craig make a verbal confession, and it was the same with the written one. The witness had applied to the Attorney General, both personally

sonally and by letter, to know if he was to prepare Craig for eternity, and the answer he received was, that he was; and the witness at all times told Craig so, and Craig always adhered to the same story.

He was cross-examined by Mr. Calbeck.

It was natural to suppose, that he (Craig) was agitated by hopes and fears of life; and the witness dared say, he might have been so.

To a question from one of the Jurors,

He said, he never heard, that any person made him a promise of any thing to induce him to make his confession. He knew one of the persons alluded to had desired him to tell Craig, that he made him no promise, nor gave him any hopes. The person the witness now alluded to was Mr. Cuff.

Here the PROSECUTION closed.

Mr. *Calbeck* rose to state a Case, and Mr. *Baron Power* objected to it as being disorderly.

The *Chief Baron* said, that he did remember in the case of the White Boys, on a Special Commission, Lord Chief Justice Clayton, Mr. Justice Lill, and Mr. Justice Malone, did permit a Case to be stated, but not as a matter of right, but as a matter of favour.

Mr. *Baron Power* when at the Bar, never had seen it practised, when on the Bench never had suffered it, and he did not think he could now permit it.

Mr.

Mr. *Calbeck* said, that it was done in the case of the Hearts of Steel.

Mr. *Baron Power* told him that he was mistaken; but he believed not wilfully. He the Baron had himself sat upon that occasion with Lord Annaly and the late Chief Baron Foster. The late Chief Baron Burgh had spoken very ably as to points of law, but there was no attempt of that sort.

The Prisoner went into his Defence.

John Scott, the first witness therein, was examined by Mr. Calbeck.

He lived at Turlough with Mr. Fitzgerald.— Alexander O'Malley is a Justice of Peace for the County of Mayo; on the 18th Mr. O'Malley was at Turlough, and signed and sealed the warrant then produced to him.

He was cross-examined by the Attorney General.

He was sure that the name William Fulton in the direction of that warrant was not Mr. Fitzgerald's hand-writing. William Fulton wrote his own name, and not the Prisoner. The name William Fulton was written before the warrant was signed and sealed by the Magistrates.

The Clerk of the Crown, by order of the Court, then read the following warrant.

A war-

A warrant, signed Alexander O'Malley, dated
18th February, 1786.

County of Mayo } WHEREAS I have this day
to wit. } received information upon oath,
Jof John Murphy of Drina-
nough in the parish of Killicommouge, baro-
nly of Cavan and county of Mayo, that on the 9th
day of January last, informant was commit-
ted to Castlebar gaol on a false occasion of
Patrick Randal Mc Donnell of Castlebar afore-
said, where informant was neck-yoked by order
of said Mc Donnell, and no person allowed to
bring him the common necessaries of life, nor pen,
ink or paper, during the space of eighteen or twenty
days : during which time he was visited several
times by the aforesaid Patrick Randal Mc Donnell.
John Gallagher, Andrew Gallagher, William
Melvin, Robert Metlan, and Charles Hipson, all
of Castlebar aforesaid, all of which severally and
repeatedly threatened to take informant's life, if
he did not swear that George Robert Fitzgerald,
Esq; of Turlough, desired, or rather commanded
him to fire a shot at the aforesaid Patrick Randal
Mc Donnell.

That upon sending his discharge to the gaoler,
in whose care he was, who enlarged him, he was
met by the aforesaid Patrick Randal Mc Donnell,
who most violently and feloniously seized him
and dragged him back into the body of the gaol,
and taking the keys from the gaoler, locked him
in, carrying the key along with him to his lodg-
ing, and so continued to keep informant in confine-
ment for the space of ten or twelve hours, without
any order whatsoever ; at the end of which time
he brought a fresh committal against him, deli-
vering

vering the keys with said committal, to the gaoler.

Saith, upon being lawfully discharged a second time, he was met by said Patrick Randal Mc Donnell and Hipson aforesaid, who seized him as aforesaid, telling him that he would lodge him in a place that no discharge would or could release him from; upon which they dragged him to the house of Michael Moran, cabinet-maker and ale-house-keeper in Castlebar aforesaid, who, upon seeing him, advanced with a naked sword in his hand, swearing by G—d that he had a great mind to take his life before he would part him; upon which he was dragged up stairs in said house and lodged in a room therein, where there was a strong guard of the aforesaid banditti placed over him, which guard forced him to creep in under a table, where they watched or guarded him with nine guns or bayonets, six or eight case of pistols, and four halberts.

That the said Patrick Randal Mc Donnell gave strict orders to the aforesaid guard or banditti, that in case there should be any lawful demand made by informant, that they might take away his life, and let those that made such a demand take his corpse, which informant believes they would have done were it not for the interposition of the high sheriff that enlarged him.

These are therefore in his majesty's name strictly charging and commanding you the under-named, upon sight hereof, to apprehend the bodies of Patrick Randal Mc Donnell, John Gallagher, Andrew Gallagher, William Melvin, Robert Metlan,

Metlan, Charles Hipson, and Michael Moran, and them or any of them so apprehended, you are to bring before me, or some other of his majesty's justices of the peace for said county. And for so doing this shall be your sufficient warrant. Given under my hand this 18th day of February, 1786.

Signed,
ALEX. O'MALLEY.

To all high and petty constables in said county, especially to *William Fulton* and his assistants, this to execute.

He also read
A warrant, signed Alexander O'Malley, dated 16th February, 1786.

County of Mayo } WHEREAS I have this
to wit: } day received information upon
oath, of John Murphy of Dris-
nanough in the parish of Killicomnoge, ba-
rony of Cavan and county aforesaid, on the
9th day of January, as the informant was ly-
ing in his bed in his own house, between the
hours of eleven and twelve of the clock at
night, he was greatly alarmed to hear both the
doors of his said house burglariously broke open
at once, which was no sooner done, than he per-
ceived one of the party that so forced or broke
open the same, advanced towards the fire; and
thereupon taking a lighted or kindled turf, with
which he lighted a candle that he had brought
along with him, which was no sooner done, than
informant's bed was surrounded by a banditti of
armed men, namely, John Gallagher, Andrew
Gallagher, William Melvin, Robert Metlan,

Alexander Mc Donnell, and Charles Hipson, all of Castlebar in said county, (which last mentioned Hipson commanded the aforesaid banditti,) to seize informant, which they did accordingly, and dragged him most inhumanly out of his said bed, each and every of them aiding, assisting, and abetting one another.

That the aforesaid Andrew Gallagher aided, assisted and abetted by the aforesaid banditti, did, then and there most wantonly, wilfully and feloniously fire a shot from a pistol loaded with gunpowder and leaden slugs, or leaden shot, called Swan drops, at informant, with an intention to take away his life, without assigning any reason whatsoever; which treatment they persisted in without intermission until they brought him into Castlebar aforesaid. Upon which they brought him to the house or lodging of Patrick Randal Mc Donnell, into whose presence they immediately conveyed him.

That the said Patrick Randal Mc Donnell offered him a reward of 300l. sterling, if he would swear or make affidavit, that George Robert Fitzgerald, Esq; of Turlough, desired or commanded him to fire a shot at him the said Patrick Randal Mc Donnell; and finding that informant would by no means perjure himself for any reward whatsoever,

That he the said Patrick Randall Mc Donnell did then and there make oath on the Holy Evangelist, that if informant did not swear or make oath, as he desired him, that he would erect a gallows and hang him on the spot; at the same time

time calling for a rope, in order to perpetrate or put his wicked and felonious design in execution; which said rope was brought unto him by Hipson aforesaid; on sight of which informant, knowing by common report, that the said Patrick Randal Mc Donnell was wicked and desperate enough to hang him, was put into bodily dread and fear of his life, and more especially as the said Patrick Randal Mc Donnell is a justice of the peace. And did wickedly and feloniously with a sacred oath, threaten to hang informant; and the more so, because informant well knew that the said Patrick Randal Mc Donnell then did, and still doth entertain and associate with a numerous armed banditti, for the purpose of annoying the laws, to the great terror of the whole country.

These are therefore in his majesty's name, strictly charging and commanding you the undersigned, on sight hereof, to apprehend, the body of Patrick Randal Mc Donnell, Andrew Gallagher, John Gallagher, William Robert Metlan, Alexander Mc Donnell, and Charles Hipson, and them, or any of them so taken, you are to bring before me, or some other of his majesty's justices of the peace for said county, to be dealt with according to law. And for your so doing this shall be your sufficient warrant. Given under my hand and seal, this 18th day of February, 1786.

Signed,

ALEXANDER O'MALLEY.

To all high and petty constables in said county, especially *William Fulton* and his assistants. This to execute.

The

The Rev. Mr. Ellison was again examined—
He had frequently seen Mr. Bollingbroke write
—a paper was produced to him, it was signed by
Mr. Bollingbroke.

The Clerk of the Crown by direction of the
Court, then read a Warrant signed by JOHN
BOLLINGBROKE.

County of Mayo? By John Bollingbroke, Esq, one
to wit. } of his Majesty's Justices of the
Peace for said County.

WHEREAS I have this day received information
upon oath by Patrick Browne of Clougher, in the
parish of Turlough, Barony of Carra, and Coun-
ty aforesaid, that on the 12th day of December
instant, between the hours of seven and eight of
the Clock at night, as this informant was sitting
in a House in Capparany, in the Parish of Tur-
lough, Barony of Carra, and County aforesaid,
which House his Master, George Robert Fitzge-
rard, Esq, ordered him to take care of, together
with the Farm annexed to it, he was on a sudden
alarmed to see the door of said House most forc-
ibly and burglariously broke open by three Men,
namely, Charles Hipson, Cordwainer, John Keefe,
and James Rafferty, Yeomen, all of Chanery
Hall, in the Parish of Turlough, Barony of Carra,
and County aforesaid, which said last-mentioned
Rafferty had a lighted or kindled Turf in his
hand, with intention to set the said House on
fire, as informant verily believes, had he not been
there; and upon entering said House, they im-
mediately placed themselves inside of the Door
with guns and pistols in their hands, which they

no sooner had done, than the afore-mentioned Hipson desired his Comrade the aforesaid Rafferty to bring him a candle, which they had brought with them, and upon lighting said candle, they made a general Search, and finding nothing in said House, they told this Informant, that if they had met with any arms the property of George Robert Fitzgerald, Esq; of Turlough, that they would have taken and carried them away. Informant further saith, that they put him in such dread and fear of his life, that he abandoned said House next morning, and further saith not.

THESE are therefore in his Majesty's name, strictly charging and commanding you the under-named persons upon sight thereof to apprehend the bodies of Charles Hipson, John Keefe, and James Rafferty, and them or any of them so apprehended you are to bring before me, or some other of his Majesty's Justices of the Peace for said County, to be dealt with according to Law, and for you and every of you so doing, this shall be your sufficient Warrant. Given under my Hand and Seal this 26th Day of December, 1785.

JOHN BOLLINGBROKE.

(Seal.)

To all High and Petty Constables in said County, especially to William Fulton and his Assistants, this to execute,

Scot

Scot was again examined on the direct by Mr. Calbeck.

He was in the House of Turlough, on the 21st of February, when Hipson, Gallagher, and Mc Donnell, were going away; it was half past 8 when Brecknock came from his bed. Brecknock was not up when they went away; he might have been up before the witness saw him.

He was again cross-examined by the Attorney General.

He came from Bengal, with Mr. Charles Lionel Fitzgerald, in the year 1771. He lived in the family ever since, there was no person present when Mr. O'Mealey signed the warrant, but Mr. O'Mealey, Mr. Fitzgerald, and the witness; the witness brought a candle. One Paddy, Mr. O'Malley's Clerk, drew the warrant, he, the Clerk, was not there. The Clerk wrote the warrants in the kitchen. When the witness brought in Fulton, Fulton put his own name in the warrant. Fulton writes a pretty hand. O'Malley swore Murphy, and Murphy put his mark to the warrant, both were done in the kitchen. O'Malley brought up the warrant and signed it in the parlour. The warrants were given to Fulton by Mr. O'Malley, to execute. Fulton put them into his pocket. O'Mealey did not give them to Mr. Fitzgerald.

Second

*Second Witness in the Defence,**Edward Dillon, Esq; examined by Mr. Burke.*

On the 20th of February last, he was near Ballyvara. He lay the night before at Mc Manus's, on his way from Castlebar to the county of Galway, where his own house is. He saw a parcel of men on the lands of Red-hills, with sticks and weapons in their hands, he thought they might be in pursuit of a mad dog. He saw Mr. Fitzgerald, on the lands of Red-hills joining the bog. Mr. Fitzgerald's servant was along with him. After he met Mr. Fitzgerald, he made a short way as the witness thought to Mino-la. The witness heard two or three shots, and was coming towards the House of Ballyvara, when Mr. Fitzgerald galloped up to him and said, You had better not go forward, for they are firing out of that House. He saw no shot fired from the House of Ballyvara. He heard five or six shots fired. And on reflection he thought he must have been killed if he had gone through Ballyvara. He knew Mc Donnell and Gallagher, but did not know Hipson.

To a question from one of the Jurors,

Mr. Fitzgerald did not appear to have been in disguise, he had a brown coat on. As the witness believes, it was a furtout, wrapper or riding coat; and was such as a gentleman might wear. He did not observe Mr. Fitzgerald to have any arms. Mr. Fitzgerald rode with a stick.

Third Evidence for the Defence.

The Rev. Henry Henry, examined by Mr. OWEN.

On the 20th of February he was at Mr. Fitzgerald's house at Turlough. He was there when Mc Donnell, Gallagher, and Hipson were brought there. He heard a conversation between Mr. Fitzgerald and the prisoners. The prisoners expressed a wish to know what was against them. Mr. Fitzgerald read a part of some papers which the witness believed to be warrants to them in the presence of Mc Donnell—Hipson and Gallagher in an insolent manner told Mr. Fitzgerald they did not regard his charges—Mc Donnell expressed a wish to be brought before a Magistrate. Mr. Fitzgerald thought it unsafe to send them at night for fear of a rescue—there were chairs offered to the prisoners. When the witness was at dinner he found the prisoners had been sent up stairs. Mr. Fitzgerald sent a message to Mr. Mc Donnell to know if he chose any thing, and the answer which was given to Mr. Fitzgerald was that Mr. Mc Donnell did not chuse to eat any thing. The witness slept at Turlough—he was there when the account of the killing came to Turlough—Mr. Fitzgerald was at his own house when Mc Donnell and Hipson were killed—the witness was at Turlough when Mr. Gallagher was brought back there—he heard no directions relative to a rescue—he saw the guard on the morning of the accident—he was standing about the door with Mr. Fitzgerald—the witness rose about sun rise, between seven and eight o'clock—Mr. Fitzgerald was up before the witness—the witness

witness passed in and out of the house—he heard no directions given to the guard—the guard stood at the right hand of the house nearly opposite to it—he did not see Mr. Brecknock before Mr. Gallagher was gone—Mr. Brecknock to the best of this witness's knowledge was in his room, and to his, the witness's seeing, was not about the house.

He was cross-examined by Mr. Attorney General.

He saw the warrants on the table with Mr. Fitzgerald when he read them—he does not know from whose custody Mr. Fitzgerald got them.

To a question from one of the Jurors.

He knew Scotch Andrew—he saw him at Turlough—he never was much with Mr. Fitzgerald—he slept there the night before the accident.

Fourth witness for the Defence.

John Love examined by Mr. Stanley.

He lives at Clantubberet—he remembers the 21st of February—he rose by the break of day in order to meet his daughter, whom he had sent for to Strabane; as he was going through the field called Gurtnefulla he saw several men to the number of about twelve, near Gurtnefulla, they were walking inside the wall. There was Terence Mc Donnell and Patrick Randal Mc Donnell's gardener, and some other followers of Mc Donnell's, inside of the wall in the park. They were

walking backward and forward, and the witness hid himself behind a thorn bush. They were between him and the wall leading to the cross roads. He was afraid of his life to go on. Some little time after he heard them say, If Mr. Mc Donnell would come they would soon free him by shooting Fitzgerald and some of his Northerns. At some considerable time after he saw them fire over the wall. There were high stones at the bottom of the wall, on which they got, and laid their guns on the wall and fired. He heard murder cried on the road, the men who had done this had scattered themselves down through a wood leading to Mr. Mc Donnell's, and the witness went away faster than he came and knew no more about it.

He was cross-examined by the Attorney General.

He lives at Clantubberet, it is an out-front of Mr. Fitzgerald's estate. He saw these men of Mr. Mc Donnell's before sun-rise. He did not then number them. He went behind the bush, and staid there till it was light enough to number them. He was so frightened at seeing them that he hid. The bush behind which he hid, was about seventy yards distant from them—he went there before break of day. He heard them say they would free Mc Donnell, and shoot Fitzgerald and his Northerns—he saw them mount on the stones and shoot, and then scamper away—he did not go to meet Missy his daughter, who was to come from Strabane—he did not come on account of this Rapparee business. He was sure if he had gone on he would certainly lose his life. He never returned to tell Mr. Fitzgerald and his men.

men of the danger—he had no thought of any person but himself, and he took no precaution about *Missey* his daughter—he had come before when *Humphrey George* was taken up, to prove that he (*George*) was not on the guard of *Gallagher* and the prisoners, because *George* was at *Clancubberet*, when he the witness returned at nine o'clock. He had lived sixteen years in that country, and never was before a court in that time.

To a question from one of the Jury.

The wind blew to the South-West and it was pretty windy, the men were to the south of him, the men could hide themselves if they pleased, he never was nearer to them than seventy yards.

Fifth witness for the Defence.

Samuel Mc Connell examined by Mr. Burke.

He knew *James Mc Connell*, he was his son, he is dead. Upon being asked by *Mr. Burke* what was the cause of his death?

The Court interrupted *Mr. Burke* and told him that if it was only to prove this *Mc Connell* was killed in this affray it was no part of the matter in issue, and *Mc Connell* was no further examined.

Sixth Evidence for the Defence.

Judith Kilgallin examined by Mr. Calbeck.

She lived at *Turlough* in February. She remembers the day that *Mr. Mc Donnell* was shot.

She

She was up early in the morning; she saw Mr. Fitzgerald early; she saw him frequently; she did not see Mr. Brecknock out of his room till after eight o'clock; she did not see him and Mr. Fitzgerald converse together; she heard Fitzgerald direct the party to take the prisoners to Mr. Bollingbroke's, and to do nothing contrary to law.

John Scot was called again, and examined by Mr. Calbeck.

He knows the room where Gallagher, Mc Donnell and Hipson were confined. He shut and nailed up the shutters, because there was a broken pane in the window; the shutters were not opened until after the gentlemen went away; he was forced to open it with a hammer.

Judith Kilgallin was called again.

She knew the room where Mr. Mc Donnell and the other prisoners were. There was but one window in it. A piece was broken out of one of the panes, and part of the pane was in the window. The window shutters were shut and nailed, and not opened till the prisoners went away.

She was cross-examined by Mr. Daly.

She made up the room in the morning, but not in the dark for there was a candle in it—Scot opened the window—she was not told by any body what she was to be examined, but the man who brought her told her Scot was examined twice.

Mr.

Mr. *Attorney General* stated to the Court, that he thought it necessary to rebut some part of the evidence that had been adduced upon the defence of Mr. Fitzgerald, respecting the warrants, and then called *Edmund Mc Keal*. He said that in February last he was in Turlough, he acted as clerk to Mr. Fitzgerald. [A warrant was then produced to him.] It was his, the witness's hand-writing, except the name William Fulton, which was not his hand-writing. He saw the warrants signed in Fitzgerald's parlour—Mr. Fitzgerald, Mr. O'Malley, Mr. Brecknock, Murphy and his wife, and Henry and the witness only were present—Murphy swore to two papers—they were not filled up when O'Malley signed them—[He was then shewed another warrant]—he wrote that paper also—there was no person present, but those whom he had already mentioned, when O'Malley signed the warrant—which was signed before the blank was filled up—[Another warrant was produced to him]—It was his hand-writing—[A fourth warrant was shewn him]—It was not his hand-writing—the warrants when signed were given to Mr. Fitzgerald—he did not know whether Fulton writes or not.

He was cross-examined by Mr. Burke.

He was told by one James Mc Donnell, he would be summoned—the witness said that he might spare himself the trouble of summoning him as he would come of himself,—the witness put in the date in the parlour; he had several times came to Mrs. Fitzgerald to ask her for his wages, he had got four guineas in part payment of the debt due to him,—the whole of his demand was 10l. 7s. 6d. Mrs. Fitzgerald promised him to pay the remainder,

der,---the witness had said that he would be revenged on Mr. Fitzgerald.

Andrew Gallagher was again produced. He often saw Mr. Fitzgerald write,---he saw him write several times the 21st of February last. He believes the name William Fulton, inserted in the blank, to be the writing of George Robert Fitzgerald.

Seventh witness in the Defence, Thady Murphy, was examined by Mr. Stanley.

Is a prisoner for debt in the Marshalsea of Castlebar,---he knows William Kelly; he saw him in gaol in Castlebar. The witness heard Kelly say on some quarrel with the gaoler, that he wished that he had broke the gaoler's neck for hindering him to go among his friends; and he was sorry that he had gone against Mr. Fitzgerald; for he was a good landlord, and he would not for twenty guineas that he had.

Eighth witness for the Defence, Richard Moore, was examined by Mr. Owen.

He is a prisoner in the Marshalsea of Castlebar,---he heard William Kelly say, that he would not wish for twenty pound or twenty guineas, that he had any thing to say to the affair between Mr. Fitzgerald and Mr. Mc Donnell,

Ninth witness for the Defence, examined by Mr. Calbeck.

He is a prisoner in the Marshalsea of Castlebar,---he knew Kelly, he had seen him in the prison; he heard him say he was not satisfied with what he had done, and that he would not for twenty guineas that he had done what he did.

Here the defence closed,

The *Lord Chief Baron* then proceeded to charge the jury to the following purport: That the prisoner, George Robert Fitzgerald; stood indicted with another, for having of his *malice prepensed, wilfully and traitorously, provoked, stirred up, and procured* Andrew Creag and others, to slay and murder one Patrick Randal Mc Donnell; in the very words of the statute of the 10th of Henry VII. and the indictment proceeded to aver, that a murder was actually committed on the said Patrick Randal Mc Donnell, by means of the provocation; stirring up, and procurement of the said George Robert Fitzgerald.

There was also another indictment against him of a similar nature, for the provocation, stirring up, and procurement of the murder of Charles Hipson.

The whole was but one transaction, and the evidence went to both the indictments; a great part of what had been stated in evidence on the table, had been merely introductory — a great part of it was not material, and drawn forth, not by the examination of counsel, but from the eagerness of the witnesses. He would endeavour to select such parts of it as appeared to him applicable to the case before the jury, and was happy to find that some of them had themselves taken notes.

The *Chief Baron* then went through the material parts of the evidence except that given by Andrew Craig, which he did not recapitulate, but said he would leave entirely to the jury subject to this observation, that being indicted for the same offence himself, and a principal actor in it, he had sworn with a halter about his neck, and therefore his evidence ought

not to be lightly received, but weighed in the scales of probability, even to a scruple, and no further believed than as the evidence of other witnesses, where they swore to the same facts, confirmed it, or, where he was the single witness, rendered it probable. He said that to convict the prisoner of the offence laid in the indictment it was necessary first to prove that a murder was committed by persons named in the indictment or some of them; next that they acted by the procurement of the prisoner. That it was proved that two homicides were committed, and committed by some of the persons charged on the indictment with that fact; for all those who were named by the witnesses to have been in the guard, when that fact was committed, were part of the fifteen or sixteen charged in the indictment. But whether these homicides amounted to murder would depend partly on evidence, and partly on matter of law; that if they believed the evidence for the crown, the persons who composed the guard had directions to shoot and make sure of their prisoners, if there was even the colour of a rescue; that there was in truth no rescue or attempt to rescue, but merely a shot fired by one of their own body to give the appearance of a rescue, and that thereupon Hipson, though bound with cords and unable to resist or escape, was shot dead upon the spot, and McDonnell shot in the arm, and when lying on the bridge helpless and unresisting, dispatched. The prisoner indeed attempted to justify these homicides, by proving an endeavour to rescue by some friends of the deceased. What credit John Love, who gave an account of this transaction, to which he was the single witness, deserved, he must leave to the jury: but supposing, according to

to the evidence of that witness, that twelve men had actually came and fired upon the guard, where they therefore to kill their prisoners? Certainly not. They might *perhaps* be justifiable in killing the assailants, but not in killing their prisoners, who neither joined in the rescue nor made the least attempt to rescue. He conceived that to kill prisoners charged with a misdemeanor or arrested by civil process in case of flight or rescue, would be murder or manslaughter, according to the circumstances; and that the killing a prisoner even under a charge of felony, could not be justified, but where his own flight and resistance was attended with circumstances which shewed that he could not be otherwise overtaken or secured. The killing should not appear to be a wanton killing, but founded in necessity for the execution of the law, and the advancement of justice.—But what was the charge against the prisoners here; the word feloniously is introduced into two of the warrants, though the fact stated in them does not amount to felony. They are both signed on the same day; and to the shame of the commission of the peace! by the same magistrate, for the same fact, and purpose; the one clearly supplemental to the other. It was with reluctance that he observed upon another warrant, by another magistrate, that the word *burglariously* appeared upon the face of it; tho' upon inspection, the entry charged as a crime upon the warrant, was not done with any felonious intent; and such an intent must always appear, in order to constitute that crime which is denominated *burglary*. The whole seemed one connected plan, to give a colourable foundation for the killing of the prisoners; he meant Hipson and Mc Donnell: and he had no doubt but that in point of

law, that killing under all the circumstances of the case amounted to murder. It was most necessary to shew, that the persons who committed this murder, acted by the procurement of the prisoner; and of this there was abundant evidence, if they believed it.—Evidence of a plot laid by the prisoner against the lives of the deceased and Gallagher; a plot to take away their lives under colour of law;—charges of felony introduced into warrants when no felony appeared to have been committed;—a law book produced by Brecknock, and a passage read out of it by the prisoner, to shew that it was lawful to shoot a prisoner charged with felony, in case of a rescue.—Evidence of great joy expressed by him when the unhappy men were taken under these warrants. Evidence of directions given by him to be sure to kill them if there was even the colour of a rescue. Evidence of a sham rescue contrived by the prisoner for the purpose. The deceased killed under colour of this rescue.—Evidence of great dissatisfaction expressed by him at the escape of one of the unhappy victims. And the horrid expression of “*dead men tell no tales*.”—All this and more had been laid before the jury, and was sufficient, if they believed the witnesses, upon whose credit it was their province to decide, to bring the charge of procuring the murder to be committed, home to the prisoner.

He then observed upon the evidence of some witnesses examined by the prisoner, to impeach the credit of the witnesses for the crown. Whether the evidence of those witnesses contradicted that of the witnesses for the crown, in points so material, as utterly to destroy the credit of the latter, he must leave to the jury to determine. Upon the whole, if they believed the witnesses for the crown, they ought to find the prisoner guilty, and if not, they ought to acquit him.

Baron

Baron Power. If this were a mere question of fact, unincumbered with law, he should not trouble the jury with one observation; but, as a question of law of importance to every subject, and which seemed not to be well understood, was involved in the general question for the consideration of the jury, he would state what the law was, calling upon the learned counsel for the prisoners to set him right if he mistated any one rule or principle of law.

The crime of murder, he observed, had been made high treason in this kingdom so long ago as the 10th year of King Henry VII. not as some ill informed historians suppose, because murder was then more frequent in Ireland than in England, but because the benefit of clergy was then allowed in murder both in England and Ireland, and at it was found no easy matter in England to exclude murder from this privilege, (for it was not until the reign of Henry VIII. and Edward VI. that in England any but the unlearned, who least knew the nature of the crime, were capitally punished for murder) the legislature in Ireland declared murder to be high treason, to which the benefit of clergy never did at common law extend,

So Murder being then made high treason in Ireland, this rule of law must necessarily have followed, that "every act which in felony made men accessories, will in high treason, make them principals;" but the legislature not content with this derivative treason, expressly declares—that if any person shall of malice prepenſe *provoke, stir, or procure* any person to murder any of the King's subjects, he shall be deemed a traitor attainted of high treason, as if he had been guilty of treason against the King's person—it is on this part of 10 H. VII. the prisoner at the bar stands indicted,

indicted. And the indictment very properly alleges the murder to have been committed. Thus the crime of murder, and that of procuring it to be committed, is made one and the same crime; whereas if the procuring murder remain an accessorial offence, it would not in consideration of law be the same offence as murder, because the offences of principal and accessory specifically differ.

Out of this charge, he observed, two questions must arise; it being confessed on both sides that an homicide was committed.

First, was the homicide murder? or was it manslaughter, or justifiable, or excusable homicide?

Secondly, Did the prisoner *provoke, stir, or procure* any of those persons named in the indictment to kill Mr. McDonnell?

If, from the evidence, the homicide be not murder but manslaughter, or justifiable, or excusable homicide, there will be an end of the present indictment against the procurer; the prisoner cannot be said to have procured that to be done, which never was done. With respect to the evidence, he told the jury, that whether the matters of *fact* alleged on the part of the prisoner, either as a justification, excuse, or alleviation, be true, or not, was the proper province of the jury, and of the jury only; but whether, if true, the homicide be justifiable or not, was the province of the court. That an homicide was committed was confessed on the part of the prisoner: but that the persons who committed it were guilty of murder, is denied; and though they were guilty of murder, it is denied also that the prisoner did *provoke, stir up, or procure* any person to commit that murder.

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With respect to the first question, whether those who committed the homicide were guilty of murder or not—he observed, that the *justification* set up, on their parts, was this—that Mc Donnell, Hipson, and Gallagher were prisoners in custody of the law, charged with a criminal offence—that a rescue was attempted by or on the part of the prisoners—that Mc Donnell and Hipson were shot in consequence of that rescue, and the homicide justifiable.

The second question was a mere matter of fact, proper only for the Jury to determine; it was sworn by three witnesses that he did procure some of those persons to commit the act, but whether those witnesses deserved credit, they (the Jury) were the only judges—he should only observe, that if any of them deserved credit, there was sufficient evidence in point of law to support the bill of indictment.

The justification, he said, involved two questions:

The first, a question of *fact*. Whether a rescue was attempted, by or on the part of Mc Donnell and Hipson?

The second. Supposing a rescue was attempted, whether under all the circumstances of this case, the homicide was justifiable? And here he stated that, from the nature of the defence, it could not be excusable homicide, either on the principle of misadventure or self-defence; neither could it be manslaughter, because if no malice, express or implied, appeared in this case, it would be justifiable homicide—it must be justifiable homicide, or it is murder.

In considering the first question, whether a rescue was attempted or not? he would only say, that the
Jury

Jury should reflect on the relative situations of the persons alledged to have attempted the rescue, and those who were appointed to guard and conduct them. Hipson and Gallagher were tied together; and Mc Donnell on Horseback, with his horse led by a man armed—thus *three* men *unarmed*, guarded by *twenty* or *thirty* men all in *arms*, (twenty was the number sworn to by Craig) are said to have attempted a rescue. And with respect to the evidence of Love, who swore that he heard a party swear they would rescue Patrick Mc Donnell, what does he say? That the moment after they had discharged the firelocks, without the least attempt on their parts to effect their avowed purpose, they ran away. The probability of such evidence as that of Love, when the Jury came to weigh the first question, would, he said, well deserve their consideration.

The next question (a mere question of law) was whether, supposing a rescue was attempted by or on the part of Mc Donnell and Hipson, the homicide can be justified? Before he stated what the rule of law was, he was bound to observe; that several strong objections were made by the *Attorney General* to the warrants under which Mc Donnell, Hipson, and Gallagher were arrested; but, if the prisoner had failed in proving the justification, whether these warrants were illegal or not, would cease to be a necessary object of inquiry; he would therefore consider the justification.

Supposing then a rescue to have been attempted, the rule of law in every such case, he said, was this, where any person having authority to arrest or imprison, using proper means for the purpose, is resisted, and the party resisting is killed, it is justifiable homicide. So, if a felon attempts to fly from justice,

tice, and in the pursuit the party flying is killed—*where he can't be otherwise overtaken*—it will be justifiable; but, in both cases, it must appear, that there was an *apparent absolute necessity* on the officer's side—it must appear that the prisoners could not be detained in custody unless such homicide was committed; and if such apparent necessity does appear in this case, it will not be murder in the officers, it will be justifiable homicide—the officers were then guilty of no fault, not in the minutest degree.

What evidence then is there of any such apparent absolute necessity? might not the prisoners have been detained in custody, without committing the homicide? twenty men armed, guarding three prisoners unarmed and tied, are attacked by twelve men who fire over a wall, but immediately fly and run away; what necessity was there to fire at the prisoners then in custody? they were unarmed, and it is not pretended they attempted to fly until they were fired at. No absolute necessity therefore appeared in evidence to justify the homicide, and in such case he was bound to declare, that it was murder in the officers who fired, and all who were present, aiding and assisting. But if any doubt remained on this part of the case, he said it would well deserve the consideration of the Jury, whether upon the whole of the evidence, this transaction did not appear to be an artful device and contrivance to take away the lives of the deceased under colour of law. If it did, it was murder in all who were privy to the transaction, murder highly aggravated—if murder was capable of aggravation. Such a scheme, he said, carried with it internal evidence of cool and deliberate malice, and, in point of law, it was murder in all who were privy to, and carried the plan into final execution; but this case,

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he observed, did not rest on implied malice, evidence of exprefs malice was given.

Upon the whole, he said, that it was to him clear, that the justification insisted on the part of those who committed the homicide, could not be supported by any rule or principle of law—those who committed the homicide were therefore guilty of murder; but it remained for their consideration, whether the prisoner did *procure, stir up, or provoke*, any of the persons named in the indictment to commit the murder? that was a question merely for the consideration of the Jury; from the court they were to expect no opinion, it depended on the evidence, and the credit due to the witnesses, of which they (the Jury) only were the judges; if they were fully and clearly of opinion, that he did, and that the murder was accordingly committed, they could have no hesitation in finding him guilty; but on the contrary, if they did believe that no murder was committed, or if committed, that the prisoner at the bar did not procure, provoke, or stir up, (to use the words of the statute) any of the persons named in the indictment, to commit the murder, then they were bound to find him not guilty.

The Jury returned in about fifteen minutes, and brought him in **GUILTY**, in both numbers.

Mr. Fitzgerald was then remanded.

Adjourned till to-morrow at eleven o'clock.

The Court rose at twelve o'clock at night.

SATURDAY, JUNE the 10th.

The Court ordered up all the Prisoners except Mr. FITZGERALD and Mr. BRECKNOCK; and they being brought up, and having agreed to join therein, were by the Clerk of the Crown directed to look to their challenges; and after seventeen peremptory challenges made by them, the following Gentlemen were sworn on the petit Jury.

Thomas Samuel Lindsey, of Milford, Esq.
 Peter Lynch, of Castlecarra, Esq.
 Thomas Lindsey, Jun. of Hollymount, Esq.
 John Bingham, of New-brook, Esq.
 William Ousley, of Rush-brook, Esq.
 Bartholomew French, of Rockfield, Esq.
 Arthur Lindsey, of St. Audreys, Esq.
 Thomas Ormsby, of Ballinamore, Esq.
 Martin Kirwan, of the Grove, Esq.
 Edmond Gildea, of Weatherforth, Esq.
 Joseph Lambert, of Togher, Esq.
 Courtney Keney, of Ballinrobe, Esq.

THE Clerk of the Crown then gave in charge to the Jury; James Foy, John Fulton, John Cox, James Masterfon, David Saltry, otherwise Simpson; Philip Cox, William Fulton, Archibald Ewing, otherwise Newing; John Berny, Humphry George, Michael Brewin, John Rehanny, William Robinson, Wallace Kelly, and David Simpson, from a note on the Crown Book for that they on the 21st of February, in the 26th of the King, at Kilneccarra, did traiterously and

feloniously kill and murder Patrick Randal M'Donnell; they were also given in charge for the murder of Charles Hipson.

Mr. ATTORNEY GENERAL *stated the case.*

First Witness on behalf of the Prosecution.

Mr. Andrew Gallagher examined by Mr. O'Hara.

He was in Turlough House, on the 20th of February. The witness was brought out on the 21st. with Patrick Randal M'Donnell and Charles Hipson, who are both dead. He saw a great number of persons assembled before the House, before he came down. James Foy, William and Wallace Kelly, Patrick Dornin, one Chapman, one Saltry, Archibald Ewing or Newing; Macbrue, John Berney, Humphry George, John Renchy, David Simpson, and all the people mentioned in the indictment except Masterfon and the two Coxes. He was brought down tied by Fulton. He was tied with a small cord which the weaver's call thrums. He was tied together with Hipson. Mr. M'Donnell was led out by the party. They were all armed. Every man of the party had a gun except William Fulton, who had a blunderbuss. He heard directions given to James Foy and Andrew Craig, to move the guard up higher, and to tell them if any rescue was attempted, to shoot their prisoners. He saw Foy and Craig go up to the party, and heard Andrew Craig give the directions. He saw Foy speak, but whether

whether he gave any directions he did not know. They proceeded towards Ballyvara, Foy remained with Mr. Fitzgerald. When they had got about forty yards on, Mr. Fitzgerald cried holla! Andrew Craig called to the party to stop, Foy then came up, and spoke to Craig for about five minutes. The party were then ordered to march, Foy came with them for some distance. The witness perceived a bustle in the rear, and heard a shot fired, and Andrew called out, "kill the prisoners." His apprehension had made him look back: John Fulton was there. He wore a white coat faced with blue. David Simpson was there; for he at that time thought him the tallest man he had ever seen. Dornin was there. He could not say whether in consequence of that shot, that any body was killed; but he thought that Mr. M'Donnell was wounded. There was no general volley, but they fired in succession. More than three parts of the party fired. Hipson was killed by one of the shots. There was no rescue, or attempt of a rescue. There was a number of shots fired after the witness when he fled. One he believed was fired out of a blunderbuss. It frightened him much, it tore up the ground in a very remarkable manner. He thinks it was fired by Fulton. He was wounded by a shot fired by M'Connell. M'Connell is dead. He believes the man who hit M'Connell was Dornin. In about eight or ten seconds after the witness had thrown himself into the ditch, he got up over the wall, and saw John Cox, and James Masterfon about the dead body. He saw William Robinson riding upon a grey nag towards where the dead body was. The witness was discovered and brought out.

(Here he shewed to the Court and the Jury the stocking which Mr. M'Donnell wore when he was
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formerly wounded in the leg, and he also shewed the coat which he himself wore on the day of the murder.)

More than twenty shots had passed through his coat. He begged his life from Wm. Masterfon, in the most moving terms he was capable of. He was told they must bring him to Turlough. William Fulton was for having him dispatched instantly, Oh! says he, you were a great man yesterday, and pointed his blunderbuss at the witness. The witness leaped behind Cox to preserve himself. They brought him back to Turlough. When he was discovered Simpson was not there. James Masterfon fired a shot at him, which came within a few inches of his face on the day of the twentieth at Ballyvara. He did not see Foy after he had seen him converse with Scotch Andrew, until he saw him on his return to Turlough. M'Donnell, or Hipson, or himself, had no arms, nor made any kind of resistance.

(Here he shewed the clothes which were worn that day by M'Donnell. They were much torn by balls, and a great effusion of blood upon them; he also shewed the saddle which his, (M'Donnell's) mare had on that day, the pummel of which was perforated by a brace of balls.

He did not see Cox or Masterfon join the parties; but he saw them over the dead body, when he was brought out of the field where he had concealed himself.

He was Cross Examined by Mr. Burke.

Pat. Randal M'Donnell was considered as a very peaceable man by all people, except those whom he

he was concerned with in law matters.—Pat. Randal M'Donnell was indicted for shooting out of a blunderbuss at George Robert Fitzgerald, and lodging shots in him—but he was acquitted.—It was seven o'clock in the morning when the witness was brought down; there was a light wind.—There were a great number about the house when the guard was called out.—The witness was in great terror and confusion; he expected death from seven o'clock in the morning until two o'clock, when the people came to Turlough with Mr. Ellison.—He constantly looked out of the window, except once, when Fulton was going out of the room, that he looked after him.—The reason of his looking out was to see if he had any friend among the guard, or whether any one of them looked like an honest man. Philip Cox had no gun. He believed John Cox was very sorry to have seen him in that condition. He was the last of the guard when they were drawn up before the house. The guard were distant from the house about the space of the breadth of the road. The reason why he heard Craig, and not Foy, was, because one spoke louder than the other. He was brought down immediately. He knew every one of the prisoners at the bar. He knew the faces of the principal part of the guard. He saw Foy afterwards for a part of the way, but afterwards did not see him until they met again at the house of Turlough. The witness was at the front of the guard, and always expected to be shot, and turned about constantly. When he turned his head back and heard the shot; he heard a bustle and looked back, he then heard a shot, not the rescue shot, but in about two seconds after it; for as soon as Andrew Craig cried "a rescue," two shots were discharged, "pop," "pop," and then three or four shots; the shots were discharged

charged very nearly as close to each other, as a man could in quick succession clap his hands. When the witness came over the wall, Cox and Masterfon seemed very sorry for his situation. Fulton pointed a blunderbuss at him. He said he could form no belief whether the blunderbuss was charged or not: but being pressed to form a belief, he rather believed it was charged, for he had time to have charged it, and fired it a dozen times, in the space which had passed from the time when the witness saw it discharged. As the witness lay in the ditch, he heard all the party crying, God damn him, the villain, to M'Donnell, he will make his escape.

Second Witness for the Prosecution.

WILLIAM KELLY examined by Mr. PATTERSON.

He was appointed of the guard, on the 21st of February, to guard Hipson, M'Donnell and Gallagher. He received instructions from Mr. Fitzgerald. He was desired to take the prisoners to Mr. Bollingbroke, and to fire at and shoot them if a rescue attempted. He received directions from Andrew Craig to the same effect. James Foy gave no directions in his presence.—The party met no opposition from Gallagher, M'Donnell or Hipson; nor did M'Donnell, Gallagher or Hipson, attempt to fly. About a quarter of a mile from Turlough, the witness heard a shot, and he heard Andrew Craig cry out, "A rescue, mind your prisoners." Two shots were then fired; these two shots were fired by Andrew Craig and John Fulton, as he believes. He does not know any other men that fired. He does not know

know whether John M'Mullen was of the party or not: he saw two men fall by the shots fired, and these two were Gallagher and Hipson, and M'Connell also was then certainly shot: he heard no shots fired but two, but if three or four shots were fired together, it would be impossible to distinguish them. It was from the party sent by Mr. Fitzgerald that all the shots came—he saw Mr. M'Donnell after the shots fired, and his mare leaped about, and Mr. M'Donnell cried out, murder! and the mare carried Mr. M'Donnell on to Kilnecarra-bridge—the witness saw M'Donnell afterwards on the bridge of Kilnecarra—he was lying on one side, and the arm which was uppermost was whole: there was a man standing on the bridge with a hatchet in his hand. The witness knew very few of the men who were of the guard—he was a stranger—Andrew had ordered him to go straight forward and not to look back at all. When he saw M'Donnell on the bridge, the witness cried to Scotch Andrew, “ Ah murder! Andrew, do not hurt the Gentleman any more;” to which Andrew replied, by swearing by the Most High, that he would drive the contents through his soul. James Foy was not of the guard—John Cox was not of the guard—James Masterson was not of the guard—Philip Cox was not of the guard—William Fulton was of the guard—John Fulton was of the guard—he believes David Saltry was not of the guard, but he might be of it without his knowledge. Archibald Ewing was not, of his seeing, of the guard. John Reamy and David Simpson were of the guard.

Third Witness for the Prosecution.

Andrew Craig was called on the table, and Mr. Stanly objected to his being admitted to give testimony. He said he was sorry it did not fall to his lot to object to this man's being examined in an earlier stage of the prosecution. He did not mean to contend, that a person indicted was not a competent witness for the Crown—but most certainly the admitting or not admitting approvers by the old law was a matter of sound discretion; and there were certain rules and principles which governed that discretion, which ought now to prevail and guide the discretion of the Court in the modern practice, of admitting or rejecting accomplices as witnesses for the Crown. It appeared judicially to the Court, that Andrew Craig is indicted for the murder, and that he was the very principal, who, with his own hand, had committed the murder. In the old law of approvement, which is out of use though not out of force, there are certain rules and principles in admitting or rejecting persons offering themselves as approvers, which still do, and must prevail, and ever ought to guide the discretion of the Court, in admitting or rejecting a King's Evidence. That discretion should be a sound discretion, regulated and governed by principles of substantial justice, legal discernment and sound policy. If it is not absolutely necessary for the execution of the law against notorious offenders, that accomplices should be admitted as witnesses, the practice of admitting

admitting them in any case is liable to great and strong objections. The law of approvement in analogy, to which the modern practice of admitting King's evidence has been adopted, is still in force, and is very material, and ought to be the rule to guide the discretion of the Court. By that law, a person offering himself to be an Approver, must be one indicted of the offence, and in custody on that indictment. He must confess himself guilty of the offence, and desire to accuse his accomplices; after which the Court assigned him a Coroner, before whom he made his confession, and after his appeal was put into form, he was obliged to return into Court, and repeat his confession; and if he varied in a single circumstance, even in the colour of a horse, or in any trivial circumstance, so nice was the law, that the Court rejected him, and he was condemned to be hanged. So the Appellee had a right to make many *legal exceptions* to the person of the Approver, and if it appeared he was the very *principal that committed the fact*, the Court refused and rejected him as an Approver. My Lord Mansfield lays it down in the case of the King against Margaret Caroline Rudd, in Cooper's Reports, that the modern practice of admitting accomplices as King's evidences has been adopted in analogy to the old law of approvement. And that the same rules and principles prevail in the one that did in the other. And therefore as it appears that Andrew Craig, who now offers himself as a King's evidence, was the very principal that with his own hand committed the murder, the Court should reject him; particularly, as another accomplice had been already admitted as a witness for the Crown: and

in confirmation of this doctrine, every act of state, every royal proclamation, offering a reward and pardon to accomplices for discovery of their partners in guilt, has an express exception to the person who actually commits the fact.

The *Chief Baron* said, the only question was, "is Craig a competent witness or not?" And there is no question better settled in the books of Crown Law, than that a man shall be a competent witness, notwithstanding his being indicted and arraigned; and it has even been doubted, whether he be not competent after conviction, and till attainder.

Mr. Baron Power,—It is no doubt a great objection to the credit of Andrew Craig that he has been indicted for the same offence, but he has been received as a witness yesterday, and unless the Court will try him upon the indictment against him, and which he (the Baron) after his having been received as an evidence, would certainly not consent to, he could surely refuse to hear his testimony. Clearly it was a strong objection to his credit, and that will be established by the nature of his testimony, and how far it is corroborated by other evidence.

The Court then over-ruled the objection, and *Andrew Craig* was examined by *Mr. Daly*.

He was employed by *Mr. Fitzgerald* to go along with the men the day *McDonnell*, *Hipson*, and *Gallagher* were taken from the house of *Turlough*

Turlough towards Mr. Bolingbroke's. He believed David Simpfom had arms, he was sure he had; John Fulton had arms, William Fulton had arms, John Rehenny had arms, Archibald Ewing had arms, Michael Berny had arms. Berny joined them at the Shoemaker's house. He could not take upon him to swear, whether Wallace Kelly was there or not. Berney joined them, but was not present at any shot, but the one shot fired by the witness himself.

[Here Mr. Gallagher Interrupted and said, M'Brue was not upon the guard, and the Chief Baron on referring to his notes, found his name, as mentioned by Gallagher, and told him so. And Gallagher said, that if he did mention him, as being upon the guard, it was a mistake; for what he intended to have said was, only that he knew M'Brue; but that he was not upon the guard.]

Craig then went on with his evidence.

Foy was not there: there was a message delivered to him by Foy shortly after his leaving the house at Turlough; but he was not of the guard. The message delivered by Foy was, "that he (the witness) had last night made a motion to save Andrew Gallagher, but it must not be. There were three guns presented at him when Mr. M'Donnell faced the guard; but he cannot say by whom, but, to the best of his recollection, Fulton was one of them. The witness gave the word a *rescue*! immediately after the rescue shot.

He was cross examined by Mr. Stanley.

He lived with Mr. Fitzgerald three quarters of a year in Turlough, all the party were neighbours within a mile, and a mile and half of Turlough. He received orders from Mr. Fitzgerald to bring in the people of the villages; he brought as many as he could bring; he could not tell how many; he knew John Fulton, because he had brought him with him to Chancery Hall. He was sure Simpson had arms. When he made use of the words "he believes" in his direct testimony, and not the words "he was sure," he thought they were the same sentiments. Masterfon he knew to be a carpenter, and he believed if he was there he must have seen him.—The witness was in the rear, the first shot was from the inside of the wall. It was hard for him to mind what was done, for it was a horrid thing to see a man murdered; he cannot tell the name of the man who fired the first shot, but he believes it was Nelly or Lelly. He was terrified much when he heard the first three shots. He was sure M'Mullen fired the next shot, because he was looking at him when he fired it; it was Mullen's shot that put him in that state of terror; Mullen's shot was the first shot fired by the guard, after the rescue shot was fired. The third shot that was fired was Chambers's. He did expect that things would be better with him than if he had not given this evidence. He did not know whether he should get a pardon or not. He had been told by common people that he would be saved by what

what he would say, but he had not been told so by people of any consequence. William Robinson was not on the guard.

To a question asked by one of the Jurors,

He answered, that Berney came only from the shoemaker's to the bridge, but he had a gun in his hand. He believed Saltry was not upon the guard.

Here *Gallagher* interrupted, and said he knew that Saltry was there, for he knew his voice, and heard him speak when he was hiding, and so he had given evidence yesterday. *Craig* in continuance said, he was not of the guard which he had chosen, nor of it when they left *Turlough*, but he might have been of the guard without his (the witness's) knowledge. The guard returned to *Turlough*, and he, the witness, was the last of the guard but two or three. He told the guard, that Mr. Brecknock had pointed out a law, whereby it was declared, That it was lawful to shoot persons attempted to be rescued, and that they were to shoot the prisoners *Dead! Dead!* by his master's directions.

Here *Simpson* begged leave to ask the witness a question, to which *Craig* answered, that he (*Simpson*) was not in the plot, and that he did not know any thing but that it was real rescue. *John Fulton*, *Chambers*, *Mullen*, and himself were only in the secret; *William Fulton* was not in the secret, nor did he fire any shot, to the witness's knowledge; the witness knew, that Mr. *Fitzgerald* would not let *William Fulton* into the secret: There

were

were none in court who were in the secret, except John Falton.

Fourth witness in behalf of the Prosecution.

Rev. Thomas Thompson, examined by **Mr. Attorney General**, he knew Andrew Craig to have made confession—there were no promises made to him. He had heard him make a verbal confession to the witness as a clergyman. His written confession was voluntary. There were never any hopes of life given to him. On the contrary, he recollected going to tell him from Mr. Coff, that he did not hold out any promises of pardon to him. That he had applied to the Attorney General, and that the Attorney General had directed him to prepare Craig for death. He exhorted Craig to pray, and he never made any variance from the confession that he first made to the witness.

He was cross examined by Mr. BURKE.

He said it was his duty as a clergyman to attend upon him.

The Rev. Thomas Ellison examined by Mr. O'HARA.

He had taken a confession of Andrew Craig's some little time before the last assize. The gaoler had told him, that Craig wished to see him, Mr. Coff, and James Browne; and that he had something

thing to tell them, but he would tell nothing 'till they were all present. He made a confession afterwards before these gentlemen. The witness since took his information. The information and confession corresponded with the evidence given by Craig upon the table yesterday.

Here the Prosecution was closed.

On behalf of the Prisoners, the first witness produced was *James Renchy*,

Who was examined by Mr. BURKE.

On the 21st of February the prisoner Renchy was in his house at Curbrack. The witness is his father. He Renchy lay the night before at Turlough, he came home about sun-rise, and remained at home until the news came that three men were killed. One William Stoops told them that Jemmy was shot, and the prisoner said "would he stay at home" and Jemmy shot," and he did not quit Curbrack until after the account of the murder.

The second witness in behalf of the Prisoner was *James Kelly*. Examined by Mr. Owen.

He is father to Wallace Kelly. He last lived on Mr. Fitzgerald's Estate, but now lives at Castlebar. He saw his son in his own house the morning Mr. McDonnell was killed. His son and he were near the bridge at Turlough, between the bridge and Mr. Fitzgerald's house when the first and last of the guns were fired.

Here the Defence closed.

T

The

The *Chief Baron* then charged the Jury, and observed, that the cases of the prisoners charged in the indictment stood on very different grounds. James Foy, John Cox, James Masterfon, David Saltry, Philip Cox, John Berney, Humphrey George, Michael Bruen, or William Robinson, did not appear to have been of the guard at the time the deceased were killed, nor to have conducted them on their way; and therefore it was but reasonable to suppose that they declined to act in obedience to the directions given them to shoot their prisoners in case of a rescue; and if the Jury were of that opinion they ought to acquit them. James Foy was perhaps guilty of another offence, but not of that laid in the indictment. But as for John Fulton, he was proved by three witnesses not only to have been of the guard at the time when they fired on their prisoners, but he was also proved by two witnesses to have been one of those who fired, and by one witness to have been privy to the secret that the rescue was only a pretence; so that if the Jury believed the witnesses, they ought to find him guilty. David Simpson was proved by three witnesses to have been of the guard when they fired on their prisoners, and by two to have been one of those who fired. Archibald Newing, and John Rehenny were proved by two witnesses, and Wallace Kelly by one, to have been of the guard at the time of firing, but it did not appear that they, or any of them joined in the firing.—However, he conceived the law to be, that when a number of persons enter into an unlawful design, and combine together to execute it, the shot, or stroke of one, is the shot or stroke of all. There was also another Legal Consideration to be attended to,

and that was, that supposing the deceased to have been arrested under lawful process, and an attempt made to rescue, but without effect, and without any resistance on their own part, or any attempt to escape, and no necessity shewn for the killing, there could be no doubt, that in point of law, that killing was murder.

It had appeared indeed that some of these men were ignorant whether there was a real attempt to rescue; but the whole party had received directions in case a rescue was attempted, to kill their prisoners at all events, and they pursued these directions in a manner which shewed a determined purpose to execute their horrid commission, whether there was any necessity for it, or not.—They might perhaps be deluded with a belief that it was lawful to do so; but in his apprehension that was not sufficient to justify or excuse them in the eye of the law, of which every man is presumed to be conscious. It might weigh with his brother and himself to lay the situation of those deluded instruments of another man's cruelty and artifice before Government, but would not justify the Jury in acquitting them.

As to two of them, Wallace Kelly and Rehenny, the two stories are so like, that they cannot be easily reconciled to belief. If, however, the Jury did believe the testimony of their witnesses, in contradiction to that of the witnesses for the Crown, they must acquit them. If not they must find them guilty.

T 2

Mr.

Mr. *Baron Power*. The nature of the question now for the consideration of the Jury, made it necessary, he said, to repeat what the law was, that an opinion may not circulate (and which he was sorry to hear had circulated) that wherever an attempt was made to rescue any persons in custody, those who have the custody of such prisoners may kill them; adding, that by stating what the law was, men would also see what the law was not.

He observed first, in every charge of murder the fact of killing being once proved, every circumstance tending to justify, alleviate, or excuse, must be proved on the part of the prisoner, unless it arises from the evidence sworn on the part of the Crown, the law implying malice, unless the contrary appeared.

That Hipson and M'Donnell were killed by the party sent to conduct them, was a fact not denied. The question then was, whether there appeared sufficient matter to *justify, excuse, or alleviate* that homicide.

Warrants against M'Donnell, Hipson and Gallagher, for criminal offences, and an attempt made to rescue the persons in custody, under those warrants, were the ground and foundation of the justification. (Here the Baron stated those rules and principles of law mentioned by him on the trial of Mr. Fitzgerald,) adding, it would be extraordinary indeed, if what was contended for was the law of any civilized state—that where a rescue was attempted, even without the knowledge of those in custody, it was lawful to kill the prisoners. An apparent necessity for committing the homicide must in every case appear, otherwise an attempt to rescue would be no justification; it was obvious,

obvious, he said, that such an attempt may be made use of as an artful, malicious device to kill the prisoners.

Two questions were proper, he said, for the consideration of the Jury:

First. Was there any attempt to rescue?

Secondly. Have we here any evidence of such an apparent, absolute necessity, as he had stated, whether the prisoners could not have been conveyed before a magistrate, or to gaol, without committing the homicide? If they could, then, notwithstanding the attempt to rescue, it will be murder: The question of fact was then reduced to this consideration, — Could twenty armed men carry three unarmed men to gaol, notwithstanding one shot fired at the rear of the guard, or, notwithstanding (what appeared the day before in evidence) that twelve men from behind a wall had fired twelve shots, without making any other attempt to rescue the prisoners? Upon such a question, he said, little difficulty could remain in the minds of the Jury: it was, however, a question of fact proper for their consideration, and to them he left it, with those observations he had already made.

He then mentioned particularly the names of those in the bill of indictment, against whom no evidence had been adduced, and those against whom the evidence, if deserving credit, was sufficient, in point of law, to support the bill of indictment; observing, that on the credit due to the several witnesses, the guilt or innocence of those sworn against must depend — that as to those who were proved to be present, aiding and assisting the act of him who fired, was the act of all,

all, actually or virtually present; and upon the whole, if they did believe that those who were sworn against did fire at M'Donnell and Hipson, and that the others (whose names he repeated) were present aiding and assisting, the Jury should find them guilty, otherwise their verdict should be Not Guilty.

The Jury withdrew, and in about twenty minutes brought in their verdict.

John Fulton, *guilty*
 James Masterlon, *not guilty*
 John Cox, *not guilty*
 David Saltry, *not guilty*
 James Foy, *not guilty*
 William Fulton, *guilty*
 Philip Cox, *not guilty*
 Archibald Newing, *guilty*
 John Berney, *not guilty*
 Humphrey George, *not guilty*
 Michael Bruen, *not guilty*
 John Rehenny, *guilty*
 William Robinson, *not guilty*
 Wallace Kelly, *not guilty*
 David Simpson, *guilty*.

While the Jury were out considering this verdict, the Chief Baron said, as it got so near Sunday, that he thought it both proper and humane to pass over that day, and, as the law in England, though not the law here, gave to murderers that day, in imitation of it to forbear pronouncing sentence on Mr. Fitzgerald till Monday.

Mr.

Mr. *Attorney General* said, in truth, he was well content that it should be so. But he understood that there was a motion to be made in arrest of judgment. If that motion were at all to be made, it must arise from defects upon the record, which could as well be shewn in five minutes as in five years; and the only advantage that he wished to reap, was not to hear a long speech; for the more time there were given, the longer the speech, but not the better the argument; for a good legal mind could soon produce a good legal argument.

Mr. *Burke* said, that he did not see any defect on the indictment; but Mr. *Stanley* had told him that he did; and he hoped the Court would give the Gentlemen on that side time to consult together.

The *Chief Baron* requested that Mr. *Stanley*, who was out of Court, might be sent for, and he having come in, then desired him to acquaint the Court if he had any motion to make in arrest of judgment, in the case of Mr. *Fitzgerald*.

Mr. *Stanley* prayed time to consider the question; and

Mr. *Attorney General* asked Mr. *Stanley*, as a motion in arrest of judgment must arise from error in the record, whether he had not better have the indictment read, as possibly he never had heard it, or else had forgotten it.

The indictment was then read.

Mr. *Attorney General* then desired Mr. *Stanley* would state what objections he had to the indictment.

Mr.

Mr. Stanley declared, he did not hold himself bound, in that stage of the business, to tell the Attorney whether he had any objection or not to the indictment, as he had already experienced that the Attorney General was neither disposed to grant Mr. Fitzgerald any favour, or to act with that candour and humanity that would have done honour to his station—a character that his predecessors in office had been so zealous to acquire, that he challenged him to shew a single instance since the revolution, when an Attorney General had refused or withheld his *consent*, to extend a liberal and legal indulgence to a prisoner in a capital case, as had been done by the Attorney General at the commencement of the trial. But, he thanked God, it was not necessary for him to ask the Attorney General's leave to make a motion in arrest of judgment. If, upon consideration, the case would admit of it, happy it was for his unfortunate client, and happy it was for him, that he could have recourse to judges who had wisdom enough to comprehend, and power enough to extend, those advantages which the nicety and caution of the law provide in cases of life, without the *consent* of his Majesty's Attorney General.

Mr. Stanley then told the Court, that he did not think it necessary for him at that time to state whether he had or had not any objections to make in arrest of judgment, for he would undertake to shew that, if Mr. Fitzgerald was then standing at the bar, and that the indictment was the most perfect one that ever was drawn by the hand of a lawyer, that the Court could not pass sentence on Mr. Fitzgerald, and he would state his reasons. It had been said by Mr. Attorney General, that Mr. Fitzgerald waved the benefit of the law, and consented to be tried before the principals; and that though in
general

general either a derivative traitor, or an accessory in felony, shall not be tried till the principal is convicted, yet he may *consent* to put himself upon his trial if he chuses. He admitted Mr. Attorney General's law, if the accessory expressly consents to be tried first—but he denied the fact. Mr. Fitzgerald never consented to be tried first; but if he did, the court would find it laid down, 1 Hal. 623. that though the accessory in felony, or the accessorial traitor in treason, does consent to be tried before his principal, yet, says Lord Hale, if he be convicted, it is necessary to *respite* judgment against him till the principal be convicted and attainted; for, if the principal be afterwards acquitted, the conviction of the accessory is void, and no judgment can be passed upon him; so, if the principal is outlawed, and thereupon the accessory is tried and convicted, if the principal afterwards *reverses* the outlawry, and pleads over and is acquitted, the conviction of the accessory is reversed. The derivative accessorial traitor is intitled to the very same advantages that the man accessory in felony is; and, upon this principle, it was most clear that no judgment could now be passed against Mr. Fitzgerald.

The *Chief Baron* then said to Mr. *Stanley*, since that was his objection, he had better wait until the jury had returned with their verdict.

Mr. *Baron Power* said, he meant to give no opinion; but, being always of opinion that it was easier to obviate beforehand an objection than answer it afterwards, in order to have put an end to the question, he had wished to have had a juror withdrawn.

The *Chief Baron* said, he had wished so for the same reason.

The jury then returned with their verdict against the principals; and Mr. *Stanley* begged time till Monday to consider whether any motion could be made in arrest of judgment.

The *Court* said, God forbid, that they should feel any inconvenience, or refuse to grant him any reasonable time he might desire; but they begged him to consider well of his motion, and to remember, that it must be made in the presence of Mr. *Fitzgerald*. If, however, he persisted in it, it was their duty to attend to, and they must and would hear his motion.

Adjourned to Monday.

MONDAY, JUNE 12.

THE court met pursuant to adjournment. Timothy Brecknock was brought to the bar, and tried upon the same indictment upon which Mr. *Fitzgerald* had been convicted. Mr. Brecknock applied to the court, and begged leave before his trial to pray to his Heavenly Judge for about two minutes. He accordingly fell upon his knees, and remained in silence for some time. When he was desired by the clerk of the crown to look to his challenges, he asked, "How it was possible for him, an alien born, to make exceptions to persons, according to consanguinity, up to the 5th degree; but he would make a general challenge of all the inhabitants of Castlebar, all of the name of M'Donnell, and, he believed, all of the name of Higgins."

The

The following Gentlemen were sworn on the Petition Jury, viz.

James Browne, of Browne-Hall, Esq;
 Thomas Samuel Lindsey, of Milford, Esq;
 John Knox, of Ballina, Esq;
 Peter Lynch, of Castlecarra, Esq;
 Thomas Lindsey, jun. of Hollimount, Esq;
 George Jackson, of Prospect, Esq;
 Smyth Steele, of Foxford, Esq;
 James Gildea, of Croslough, Esq;
 John Ormsby, of Ballinamore, Esq;
 Thomas Ellwood, of Castletown, Esq;
 John Nolan, of Loughboy, Esq; and
 Patrick French, of Ballykinneave, Esq;

Mr. *Brecknock* then addressed the Court, and said, he believed it was in his Lordship's recollection that he had formerly claimed a *Medietas Linguae* Jury; that he did not mean to mention or name the statutes of Edward, nor that of Henry the VIth, but he meant that older law of Athelstan, called, *Pax inter populum & Regem*.

The *Lord Chief Baron*. "Mr. *Brecknock*, this is wasting time. It was formerly asserted by you, that Scotsmen, before the union, had a right to a trial *per Medietatem Linguae*—the fact was not so; and since the union the practice uniformly has been otherwise: the people of Ireland and England speak one tongue, have one common language, and are governed by one common Sovereign; and let it not go abroad, that Englishmen are considered as aliens in this kingdom. Englishmen inherit in Ireland, and, *vice versa*, Irishmen in England. Both countries have the same laws, the same constitution, and the same happy government."

The Court having thus over-ruled this point, Mr. Brecknock claimed as his right the inspection of the bill of indictment, that he might know whether it was found by twelve jurors or not; for if there were not twelve jurors to the finding, the whole was over.

The *Chief Baron* then informed him, that the bill bore the name of the foreman, signed for himself and fellow-jurors, and that was sufficient.—

Mr. *Brecknock* said, Hawkins says not.

Mr. *Attorney General* then stated the evidence, and called Andrew Gallagher, who was the first witness in support of the prosecution. He was taken on the 20th of February, and carried prisoner to Turlough, where he was detained that night, he could distinguish Mr. Brecknock's voice. In the morning he observed a guard with arms. He saw Mr. Brecknock and Mr. Fitzgerald at the door in Turlough-house; they first spoke together in French, or in some language which the witness did not understand. Mr. Fitzgerald called over Foy and Andrew Craig, in Brecknock's presence, and ordered them to move the guard higher up, and to tell them, in case of a rescue, to shoot their prisoners. He heard Mr. Fitzgerald say, when Scotch Andrew went to the guard, "Ha! we shall soon get rid of them now." Oh! says Mr. Brecknock that's well, we shall then be easy indeed." M'Donnell and Hipson are dead. Hipson was shot by part of the guard from the house at Turlough; he was shot from the rear. The witness himself was wounded; he was brought back to Turlough; Mr. Brecknock told him, the witness, in Mr. Fitzgerald's house, that he would be punished for so heinous a circumstance as a rescue.

Mr.

Mr. *Brecknock* said, from what had fallen from Mr. *Gallagher*, his testimony ought not to be received; for it did appear in two manners, that he had fled from justice—*Ore tenus*; and the court had a record of his conviction upon that flight.

The *Chief Baron* begged of Mr. *Brecknock* to desert such idle babble, and to commit himself to his council.

He was then cross-examined by Mr. Owen.

He cannot speak French; but from hearing it spoken by others, he believed the language in which Mr. *Fitzgerald* and Mr. *Brecknock* spoke to be French. He saw no assent given by Mr. *Brecknock* to Mr. *Fitzgerald's* proposals; but he heard Mr. *Fitzgerald* say, "Ha! we shall soon get rid of them now;" and Mr. *Brecknock* reply, "Oh! that is well, we shall then be easy indeed;" and the words, we'll be easy indeed, were not coupled with other words. Mr. *Fitzgerald* does speak in a low voice, but the witness has heard him speak as loud as any man. As to Mr. *Brecknock*, the Court had heard him just then, and could tell whether he spoke loud or not. Mr. *Fitzgerald* and Mr. *Brecknock* were in the room together when the witness was brought back to the house of *Turlough*. Mr. *Fitzgerald* wrote several notes, and received several notes, and he shewed them all to Mr. *Brecknock*. They spoke together in a foreign language.

Mr. *Brecknock* suggested, that the statute of the 10th of Henry the VIIth was a mere temporary act; and would their lordships, after an interval of near two hundred and ninety-one years, wrest it to the present purpose?

The

*The second witness for the Crown. Andrew Craig
examined by Mr. Patterson.*

Remembered the morning M'Donnell and Hipson were shot, he saw Mr. Brecknock bringing a book into the small room to Mr. Fitzgerald; he laid it on a table or chair, and pointed with his finger, and said "there is the place you want." There was no passage read in Brecknock's presence. Mr. Fitzgerald called the Book an act of parliament, and read, or seemed to read, that it was lawful to shoot a person charged with felony, if he attempted a rescue. He saw Mr. Brecknock about the house, and at the door that morning, and talking with Mr. Fitzgerald, but he does not know about what they were talking. Mr. Fitzgerald's orders to the witness were to make a man go on, and fire the rescue shot. The prisoners were shot in consequence of that shot.

In an answer to a question from the Court,

He said, he did not recollect being present at any conversation between Mr. Brecknock and Mr. Fitzgerald before on that morning.

He was cross examined by Mr. Burke.

The witness lived for two years and half with Mr. Fitzgerald; Mr. Brecknock had been with him this year and half; Mr. Fitzgerald and Brecknock were fond of reading law books together. The witness could not tell whether it was to that point or another that the book was applied. They had lived at Turrough for nine months.

To another question from the Court,

He said, it was some time before the last general affizes, that the first attempts were made on Mr. McDonnell.

To a question from one of the Jury,

He answered, Mr. Brecknock laid the book on a table or chair.

The third Witness for the Crown. Patrick Dornin examined by Mr. O'Hara.

He was one of the guard appointed on the 21st of February; they were drawn up before the house at Turlough; he received directions from Mr. Fitzgerald—he told them how to behave. The directions were if they should meet with any opposition or rescue, to make sure of the prisoners. There were two or three questions among the people as to what was said by Mr. Fitzgerald; some said it was “kill them,” but the words he heard were “make sure of them.” Brecknock and Mr. Fitzgerald were together at the doors, when these directions were given. Mr. Hipson was killed dead. He saw no person upon the road but the guard, nor no attempt of a rescue. John Fulton was of the Guard, as were William Fulton and Renchy.

He was cross examined by Mr. Stanley.

Between six and seven o'clock the orders were given; all the guards were present. The orders were given first to Andrew Craig at the head of the guard, and then to the guard. Mr. Fitzgerald gave

the orders first at the door, and Andrew Craig told the orders on the road. All the guards were on the centre of the road. Mr. Fitzgerald came off the flag; he did not come close to the guard, he came two or three paces; the witness was in the centre of the ranks.

The fourth Witness for the Crown. Sir Neil O'Donnell examined by Mr. Daly.

He took the examinations of Dornin. Dornin was in the crowd where Mr. M'Donnell lay dead. Dornin told the Witness he wanted to speak to him about that business; that he was one of the unfortunate guard, and all the justice he could do was to tell all he knew. He had got some small shot in his back.

The fifth Witness for the Crown. James Calpin examined by Mr. Attorney General.

He was on the road the morning M'Donnell was shot; he after that saw the prisoner Brecknock; he heard Brecknock ask a man very like a minister, (who was wringing his hands) inside of him, "Why he moaned?" the gentleman passed in, and Brecknock said to the guard "Lads, your master is angry for your leaving this man alive, for he will certainly do you a great deal of harm." Gallagher was at that time about a musquet shot from the house, or better, with the guard coming down the hill.

He was cross examined by Mr. Burke.

He never told any body what he had now given in evidence, until he was summoned by my Lord the Judge. On the evening of the murder, there was a man,

man, with his wife and children who wanted to go to Castlebar, and the witness told him, if he would stay with him that night he would give him potatoes for his supper, and straw for his bed:—In return for which, the man said, if in his power, he would serve him for ever. That man was now in the service of Mr. Gregory, and he supposed that Mr. Gregory had the summons sent to him.

In a question from one of the Jurors,

He said, it was not common for the people to stand and hear any thing at Mr. Fitzgerald's doors, but he apprehended that Mr. Gallagher might be hurted, and he stayed to see how he, Mr. Gallagher, might be used.

To a question from another of the Jury,

He said, that only a third of the guard had come to Turlough when this had happened.

[Here the Prosecution closed.]

In the defence of the prisoners, the Rev. Henry Henry was first called.

He was examined by Mr. Owen.

He slept at Turlough-house the 20th of February. He saw the guard on the 21st of February last. He, as far as he recollected, did not see Mr. Brecknock before the guard went off. He did not on the former trial swear that Brecknock was in his bed, but that the witness did not see him, and believes him to have been in his room. He could not perfectly recollect whether he saw Mr. Brecknock after the return of Gallagher, he was so confused, from seeing men in the pangs of death. He did not recollect

whether Mr. Brecknock was among the people who were about the house with him. He did not perfectly recollect seeing Mr. Brecknock after the return of Gallagher.

To a question from the Chief Baron,

He said, he did recollect wringing his hands; and being asked by him, Whether he recollected to see that man who had been just examined, at that time? he answered, that he did not, from his confusion, recollect. He might have wrung his hands; but that he remembered, a man with red hair called to him, to tell him, that he was summoned by a crown summons, and requested to know whether he might with safety not attend? He knew Mr. Brecknock only for about twelve days. He believed him to be the last man in the world who would have a thirst for blood, and he would give particular Instances.

Mr. *Attorney General* objected to such kind of evidence as being inadmissible. He relied on it, that in giving evidence of character, general evidence only was to be received, and that particular instances could not be adduced.

Mr. *Stanley* contended, that it might be admitted. The clear rule of evidence, he said, was this: when a witness is called to impeach a man's character, he can only do it by general accounts of his conduct and behaviour, and he shall not be permitted to give evidence of particular facts, which the person is not then prepared to combat with evidence; for no man is bound to defend every action of his life when unprepared for that purpose. But this rule does not hold, when you call a witness to support

support a man's character, the witness may not only give him a good character, but he may give his reasons for entertaining that good opinion of him; and he remembered the point ruled at the special commission in St. Margaret's-Hill in the Borough of Southwark, on the trial of the rioters in 1780. A man was indicted on the riot act 10 George 1st, a witness was called to give him a character, he gave him a good one, and said his reason for entertaining that good opinion of him was, that he knew him to be a dutiful son, and that he supported a helpless parent by his industry. An objection was then made to this kind of evidence, and Lord Loughborough and Mr. Justice Gould, made the present distinction, and ruled it to be proper evidence.

Mr. *Attorney General* said, that when Mr. Stanley's Reports had the *fiat* of the judges, they might then be cited; but he presumed that their lordships would follow the known rules of evidence.

Mr. *Baron Power* said, that in giving general character, the witness might give evidence of the reasons why he gave that character.

Mr. *Henry* then proceeded in his evidence: he knew that Andrew Craig had a particular aversion to the prisoner. He had heard him say, that he would not call a gentleman a liar; but the prisoner went as near to telling lies as any man could do; that Craig hindered the servants from taking turf to Mr. Brecknock's room, and for doing any thing for him; and he often heard Craig say, "damn him." He did not think the prisoner a man of a sanguinary disposition, for he remembered a particular instance of Andrew Craig nicking a horse which belonged to him the witness, upon which the prisoner

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reproved

reproved him, and told him he would certainly bring down vengeance for the shedding of blood.

Second witness in the defence. Judith Kilgallen examined by Mr. Stanley.

She knew Mr. Brecknock ever since he came to Turlough. On being asked what time he arose, the prisoner interrupted and replied, "that he always rose fifteen minutes before sun-rise, to waft his prayers to heaven." On the question being put again to the witness, she said she could not be particular; he got up sometimes early and sometimes late. She did not on that day see him until after eight o'clock. She saw the guard go off, and on the return of the guard she saw Mr. Brecknock about the house.

She was cross examined by Mr. O'Hara.

She was not much fatigued with sitting up all night.

Third Witness in the defence. John Scott examined by Mr. Burke.

He was up all night. He did not see Mr. Brecknock until the guard came back. He saw the guard go off, and if Mr. Brecknock was then there, he must have seen him.

He was cross examined by Mr. Attorney General,

Who asked him, if he was the witness who had sworn on the other Night that Mr. O'Meally had signed the warrants in the kitchen,—and that had sworn that Paddy wrote the examinations there,—and that Fulton wrote his own name? to which Scott having

having answered that he was, *Mr. Attorney General* then said he would not ask him a single question.

Fourth Witness. The Reverend John Benton examined by Mr. Burke.

He had known Mr. Brecknock for some years; he believed from 1782, when Mr. Fitzgerald was confined in the new prison—he cannot tell his general character; but he did not think him capable of perpetrating any sanguinary act, because he had heard him frequently reprove men for the slightest immoralities.

He was cross examined by Mr. Attorney General.

He knew Mr. Fitzgerald very well, and always had taken him to be a man of abilities. He knew that he, Mr. Fitzgerald, consulted Mr. Brecknock as a man of law. He believed he, the witness himself, might have been consulted by Mr. Fitzgerald. He did not believe that if Mr. Fitzgerald had such a sanguinary mind, the prisoner was capable of counselling and advising such facts. He believed that he had said that the prisoner was the cause of all the mischief which had befallen to Mr. Fitzgerald; but his reason for saying so was, that he knew Mr. Fitzgerald had been led astray in his property, as to the writ of error, in which the gentleman then examining the witness as a lawyer (*Mr. Attorney General*) had been concerned; and he believed if he, Mr. Fitzgerald, had not been so misguided, Mr. Fitzgerald would not have had any occasion to have come to that country,—and he also knew that Mr. Fitzgerald had not one law book before he knew Mr. Brecknock.

[Here the prisoner closed his defence.]

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The *Chief Baron* then charged the Jury, and stated, that the prisoner, Timothy Brecknock, was charged in two indictments with procuring a murder to be committed, and the law had made that crime equal in guilt, with the perpetration of the murder itself, and with great justice; for the artful wretch who contrives a murder is more criminal than the unfortunate instrument of his malevolence. To bring this crime home to the prisoner, a murder must have been committed, and by his procurement. That a murder had been committed was clearly proved by the witnesses, and had been established by six verdicts. To effectuate that murder, a plan, and a very artful plan, had been laid. If Andrew Craig be believed, the plan moved from Brecknock, who is sworn to have produced a book, in which it was laid down for law, that it was lawful to kill prisoners charged with felony, in case of a rescue. But credit was not lightly to be given to the testimony of a person of Andrew Craig's description, especially when it appeared by the evidence of Mr. Henry, that Craig was ill-inclined towards the prisoner; Dornin, another witness, seemed also to differ from him. That Andrew Gallagher had proved, that the prisoner was present when Mr. Fitzgerald had given directions to the guard to shoot their prisoners, and gave his countenance to these directions. That when Mr. Fitzgerald expressed his opinion, that they should now get rid of these fellows, the prisoner replied, it is well; we shall then be easy indeed. James Calpin also had given material evidence to shew, that the prisoner was consenting to the plan. Witnesses were examined to the character of the prisoner. The reason why character is allowed as evidence in capital

[Here the witness closed his depositions]

capital cases is, that the law in favour of life, presumes innocence till guilt has been proved; and where the matter rests in doubt, evidence of good character fortifies that presumption; but these doubts are not to be light or frivolous doubts, but such as would arise in a steady mind, from a cool and dispassionate consideration of the case. If therefore upon the whole of the case, the jury believed that a plot was laid against the lives of the deceased, and that he was concerned in laying that plot, they ought to find him guilty: but if they thought there was no plot laid, or if there was, that he was neither privy nor consenting to it, they ought to acquit him; or, if they thought themselves warranted to entertain doubts about his guilt, it was their duty to incline to the side of mercy.

Mr. *Baron Power* observed, that this was the same indictment upon which Mr. Fitzgerald had been convicted; but the Jury should feel no prejudice on that account against the prisoner at the bar. They were not to infer that the prisoner was guilty, because Mr. Fitzgerald was proved to be so; the prisoner, said he, may be innocent notwithstanding the guilt of Mr. Fitzgerald. The bills of indictment were founded on the 10th Henry VII. charging that the prisoner did provoke, stir up, and procure certain persons to murder Mr. M'Donnell and Hipson; to support this charge, it must appear that the murder was committed; and, notwithstanding the conviction of Fulton and others on the preceding day, the prisoner at the bar might have given evidence tending to justify, excuse, or alleviate the homicide; but that defence, which had been relied on in the case of Mr. Fitzgerald, he observed, had been wisely abandoned in the present case. That there
 existed

existed any necessity for committing the homicide, that the law might have been executed, and the persons in custody conveyed before a magistrate or to gaol without firing one single shot, were facts not in this case controverted on the part of the prisoner—he had rested his defence on stronger ground. His defence is, that he did not provoke, stir up, or procure any of the persons named in the indictment to commit the murder—he observed that four witnesses had given testimony that he did; but the Jury only were the constitutional judges of the fact, and the credit due to those who attested it; that the prisoner had given evidence of general good character—with regard to this species of evidence, he would give them some legal information. If the fact alledged in the indictment be fully and clearly proved, character becomes totally useless. If a man be happy enough to have the good opinion of all his neighbours—to be thought in the opinion of all those present incapable of committing the horrid crime he was charged with—if, notwithstanding, it should be fully and clearly proved that he did kill another without any, or without a sufficient provocation, the unhappy perpetrator, however good his character before was, must answer for the crime; and character will not avail one grain in the scale of Justice: but if, on the contrary, the charge be not fully and clearly proved—if it be doubtful whether he was guilty or not—then, indeed, character should turn the scale, and the Jury should lean to the merciful side. He concluded, that it should ever be remembered by Jurors (to use the highest and best authority) “that
 “it is better ninety and nine guilty persons should
 “escape, than that one innocent man should suf-
 “fer.”

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The jury retired for about ten minutes, and returned with their verdict—**GUILTY.**

The foreman of the jury then recommended him to mercy; and having pressed it strongly, the court asked the jury if they had any doubts of the guilt of the prisoner, or any wish to reconsider their verdict?—to which the foreman replied not.

ANDREW GALLAGHER was then brought up to be tried, for the same charge which John Gallagher and the other gentlemen were acquitted of on Thursday last: and the following gentlemen were sworn of his jury:

James O'Donnel, Esq;

Patrick Kirwan, Esq;

George O'Malley, Esq;

William Orme, Esq;

Patrick Taaffe, Esq;

John Joyce, Esq;

Edmund Taaffe, Esq;

Bartholomew French, Esq;

Walter Burke, Esq;

Arthur Lindsay, Esq;

George Bingham, Esq;

Thomas Ormsby, Esq;

THE Attorney General having declared that there was no evidence,

The jury instantly returned a verdict, **NOT GUILTY.**

The court then ordered up the several persons who had been found guilty on Saturday last, to
 llw Y receive

receive sentence: and accordingly John Fulton, William Fulton, Archibald Ewing, John Rehanny or Renchy, and David Simpson, were put to the bar; and on being asked what they had to say, why judgment of death, and execution thereon, should not be awarded against them—John Fulton said, He was very young, and had been deluded;—he was a stranger, and dared not to disobey; and requested the court to give him time for repentance.

The Chief Baron then said, That mercy was not in their disposal;—that his duty was a painful one, it was to pronounce the sentence of the law upon them:—which having done, he advised John Fulton to prepare himself for immediate execution.—They were then remanded; and the gaoler was directed to bring up Mr. Fitzgerald and Mr. Brecknock.—While the gaoler was absent, the Chief Baron asked Mr. Stanley if he meant to make his motion in arrest of judgment?—and Mr. Stanley having said he did, the Chief Baron replied: In regard to the feelings of the unhappy gentleman, I avoided having him brought into court, which he ought to have been, while sentence was pronounced on the other unhappy sufferers. It is for your consideration, whether you think you are sufficiently founded in your claim for an arrest of judgment, to expose the prisoner to that situation which I have avoided, because I knew it would be painful to his feelings. If you continue in your intention, he must be brought up to be present at your motion. You will also consider, what you may obtain; for I must inform you, that, should you succeed in your motion, we must send up a new bill of indictment, free from those objections, and which will

will doubtless be found by the Grand Jury;—and we must stay and try the Prisoner, and must deliver the gaol, if we remain till the middle of term.—See also if there can be any doubt of the same Evidence convicting him again; and will you expose him again to that situation?

Mr. *Stanley* said, He was sure Mr. Fitzgerald was safe in the hands of the learned Judges;—and that, if any advantage could be derived from the nicety or caution of the Law, it would be as much the inclination as it was the duty of the learned Judges, to give the Prisoner the full benefit of those advantages.

While the Gaoler was absent,

Baron *Power* said, That one objection, and one only, had been made, and it was made by Mr. *Stanley*;—but he, the Baron, differed from him, as to that objection. If, however, it had been made sufficiently early, he would have called on his Majesty's Attorney General to bring on the trials of the Principals first. He would, however, now speak to the point.—If, in the stage that had been proposed, a Juror had been discharged, what would have been the consequence?—He knew my Lord Chief Justice Holt had laid it down, That a Jury, once charged, could not be discharged: however, there is a more modern authority, in *Kinloch's* case. But there it was done by the Attorney General's consent.

It was urged, that he Mr. Fitzgerald was a derivative traitor; and that a derivative traitor partook so much of the nature of an accessory, that

he could not be tried until after the Accessory had been found guilty: but if it were so, he had waved that benefit, by challenging the Jury. But he should endeavour to shew, by the very authority of Forster, that the indictment was for a substantive, and not a derivative treason; that it was the same as if on the 25th of Edward III.

He was indicted for *procuring, stirring up, and provoking to flee and murder*, and this is declared by the statute to be treason, like as against the King's person.

He never would try a derivative Treason or accessorial offence, until the principal should be convicted. But he said that act of parliament made it the same as the 25th of Edward III. and referred to Forster, page 342.

Here Mr. Fitzgerald and Mr. Brecknock being brought up, Mr. Baron Power forebore concluding his argument; and Timothy Brecknock being asked what he had to say why judgment of death and execution thereon should not be awarded against him?

Mr. Brecknock said he had three objections to state, which he wished to be heard to, and on which he trusted that their Lordships might arrest the judgment.

First. The statute and the sentence conveyed therein were contrary to the law of Almighty God; for when David had procured the murder of Uriah, the sentence was, that the sword should not part from his house, but that he should not die.

Secondly,

Secondly. That he had not seen the bill of indictment, to know, whether there were twelve jurors upon it, or to know, whether one of these jurors may not be a minor, or an alien, perhaps in the service of a foreign King, at war with his Majesty, as had been the case of the Gentleman at his side, Mr. Fitzgerald.

Thirdly. Being an alien, he had not been allowed the benefit of a *Medietes Lingue*.

The Court over-ruled the objections, and ordered the Clerk of the Crown to proceed, who bid the Jailor make a bar.

Put Timothy Brecknock to the Bar.

And the Chief Baron then said,

PRISONER at the BAR!

If it is possible there can be any degree of guilt beyond the crime of which Mr. Fitzgerald is convicted, it remaineth with you, Timothy Brecknock, for under the colour of the law, you devised an artful and a wicked scheme to commit a horrid and a barbarous murder. The laws of the land demand your life as a just forfeit for the blood which has been shed; and those deluded wretches whom you inveigled into your plot, and whom you deceived under hopes of safety, to become the instruments of your horrid designs, are objects of pity, when compared to the magnitude of your guilt. You made their ignorance the means of your purposes. Unfortunate old man! happy had it been for you that you never had known law at all, or that you had known it better.

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The unhappy Gentleman who is now at your side, would not have been brought to the wretched situation in which he now stands, or to the dreadful end which must now await him. Miserable man! you are fallen a victim to your own subtleties, and become the dupe of your own cunning. The venerable appearance you have assumed, and the sanctity which you affect; I fear is but put on as a disguise for the concealment of your wickedness. The law, which you endeavoured to pervert, has furnished the detection of your crime, and will shortly award the punishment which attends your conviction. Your jury, from a mistaken lenity, have recommended you to mercy, not that they doubted of your guilt, but that they pitied your age and your infirmities. Your crime is by many degrees of the deepest and blackest dye, and it only remains for me to pronounce the dreadful sentence.

He then passed sentence upon him.

The *Chief Baron* then desired the Clerk of the Crown to proceed, who bid the Jailer put George Robert Fitzgerald to the bar, and the Chief Baron proceeded by saying: You stand convicted of provoking and procuring a horrid, foul, and barbarous murder. It is my duty, and a painful task, indeed I feel it, to pronounce that sentence which the law has annexed to your crime. After a long and solemn trial, in which you had every benefit of able Counsel, and experienced every indulgence the Court could shew, you were convicted on the clearest evidence, by a jury of your countrymen; in two instances of procuring the murder of two of his Majesty's subjects. An offence which our laws so justly hold in abhorrence, that they have placed it in an equal

equal degree of guilt with high treason against his Majesty's person. In your case, which is an uncommon one indeed! it is attended with a degree of cunning and contrivance which exceedingly aggravate its enormity,—but that very cunning, which you vainly hoped would have screened you from punishment, has rather led to the detection of your guilt; the laws of your country, which could not endure that they should be made the instruments of their own violation, and the blood of the unhappy gentlemen, who had the misfortune to fall into your hands, and whom you sent into the other world with all their sins upon their heads, call aloud for punishment, and require your life as a forfeit to public justice. Even providence has interposed, that justice might not be disappointed; and, in the midst of murder, preserved the life of one man, as a witness for the discovery of your crime. The hand of GOD protected your life from assassination, that it might be offered up as a sacrifice on the altar of public justice. In the melancholy situation to which you have reduced yourself, it might be some degree of consolation to your feelings, that your ignominy and punishment were confined to your own person; but your miserable family, though innocent of your crime, are, in some measure, involved in your disgrace, and share unjustly, that shame, which your ignominious end brings down upon them. The aged parent, who bore you in her womb; your tender daughter, the offspring of your loins; your wife, the inconsolable partner of your bed; partake of your disgrace. You came into the world with the advantages of talents, which, if properly cultivated, would have carried you through life with respectability and honour. See how you have misapplied them! **Bless**
with

with the recommendation of birth and fortune; allied to great and respectable connections; possessed of every qualification requisite to render you an ornament to society, and a valuable member of the community, you are now sunk to the lowest extremity of human infamy and shame. With a mind susceptible of honourable feelings, you are become an outcast; a victim to the laws of the land, which you live in. It is my duty to pronounce to you the dreadful sentence of the law; but before I do so, let me express my earnest hope, that during the time which the mercy of the court has allowed you, you may by a sincere repentance and a heart thoroughly subdued to a sense of your guilt, recommend yourself to that mercy and forgiveness, which you can only expect from the awful tribunal before which you must shortly appear.

Here his Lordship was interrupted by Mr. FITZGERALD, who proceeded as follows:

I beg leave to trouble your Lordships with a few words. I shall be very short. I do not mean to cast blame any where. I accuse no one. From the evidence, the Judges could have given no other charge. The Jury could have found no other verdict. I think the verdict of the Jury a just one, according to the evidence which was produced; but I did not think such evidence could have been produced. I did not think such charges could have been made against me, or I should have been better prepared. I had no idea of being found guilty. There are some family affairs, which I have been endeavouring to settle, and which in truth are not yet finished, that I could have wished to have completed. All
that

that I request of your Lordship, is to give me the longest day possible; that I may be prepared to meet my GOD. However guilty I may be conceived, within a narrow circle, I hope in a higher one, the unprejudiced part of the world will think me innocent: Those who know me from my earliest life, know me incapable of such an action. I never feared death; nor am I afraid to meet it in any shape; in the most formidable, even an ignominious death. It may be thought I wish to solicit pardon; I would not accept of pardon, after being found guilty by such a Jury, because I know I could not face the world after it. It has been suggested, and I understand the report prevails, that I wish for time, in order to commit suicide. As a worldly man, I never feared to meet death; and as a Christian, which I hope I am; and a good one, what sort of a passport would that be to the place of eternity?—I forgive every one, and though I assert my innocence, I do not mean to say I have no sins; I have many which overwhelm me, and I only request time that I may make my peace with GOD.

Having finished, the Chief Baron proceeded as follows:

It is not in our power to grant your request. We are not the dispensers of mercy: Your offence is of such a nature, that my brother Judge, and myself, thought ourselves justified to have ordered immediate execution; nevertheless, from the hope that you might be better prepared to meet your approaching fate with becoming penitence, you have been allowed two days.—If by time, you mean a few hours, I am sure the Sheriff will shew you every humanity: It is my duty, and I call God and Heaven to witness, that it

is the most painful one I ever performed, to pronounce the dreadful sentence of the law.

Here the Chief Baron pronounced sentence of death upon him, on the same day.

At half past four in the evening, Timothy Brecknock and John Fulton were brought out in a cart. There being no gallows, a temporary scaffolding which surrounded the walls of the new gaol, was fixed upon as the spot of execution. Brecknock bowed to the spectators on each side, as he approached the scaffold. He was dressed in a plain drab coat, his hair curled in his neck, and a long grey beard, which reached down his bosom. He appeared perfectly serene and resigned, apparently as uninfluenced by the approach of death, as if he was a common spectator of a transaction to which he was indifferent. Fulton who was beside him, exhibited every symptom of horror and fear—his eyes remained shut—his countenance was that of a dead man, and his voice was so low as to be hardly audible to those near him. He confessed his guilt of the crime for which he was about to suffer, and said that Mr. Fitzgerald did not give orders himself, but sent them by Scotch Andrew. He stated also, that when M'Mullen and himself shot at Mr. M'Donnell, and wounded him in the leg, Mr. Fitzgerald said, the Devil fire your eyes, for a blind scoundrel, why did not you aim higher? He could not tell whether Foy was in the secret of this plot, but there were others to which he was privy. There were many Divines who attended the unhappy sufferers, and prayed round the cart. Fulton prayed with the utmost

utmost devoutness, and when the prayers became so loud and fervent that the spectators joined, the clergyman requested Brecknock to join also. He replied it was unnecessary, for he had made his peace with God, and had not to his own knowledge committed a sin for these last fifteen years. He exhorted Fulton to confess all he knew, and conceal no particle of his crimes. On their kneeling a second time, and the clergyman repeating the Lord's prayer to Fulton, Brecknock repeated it also in Greek. He stood up in the cart, adjusting his clothes, and having taken a woollen night cap out of his pocket, he said it was the last time he should have occasion to put it on; but that he had no apprehension of what he was about to suffer. He bowed to the crowd, and having drawn down the night-cap, he put one hand in his breeches pocket, and the other in his bosom, and stood for some little time in that posture, but Fulton begging for a few more moments to pray, he pulled off his cap, and told him he ought not to delay, for he had full time to prepare for repentance. Having been given five minutes longer, in which time Fulton seemed so faint as to hardly have the appearance of life, Brecknock replaced himself in the same posture, and the cart drawing off they were launched into eternity. Fulton expressed no symptom of agonies, but the unfortunate Brecknock continued for a long time alive, until the compassion of the people cried out to the hangman who pulled him by the shoulders, and relieved the wretched old man from the pangs of torture.

At six o'clock Mr. Fitzgerald was brought out of gaol. He obtained permission of the Sheriff to walk, and came through a-by-lane; and went
up

up the public street, to the place of execution. He was preceded by the hangman, who wore a large mask. He walked very fast, and arriving at the scaffolding, asked if that was the place. He was dressed in a ragged coat, of the Castletown hunt, a dirty flannel waistcoat and drawers, both of which were without buttons; brown worsted or yarn stockings, a pair of coarse shoes without buckles, and an old round hat, tied round with a pack-thread band. He fixed the rope round his own neck, first laying it bare, by taking off his cravat and unbuttoning his collar. He spoke to and shook hands with several of his acquaintance, and proceeded to the ladder. Mr. *Henry* the clergyman, who resided at Turlough-house, following him, he desired him to be short, and having repeated one prayer, he shook Mr. *Henry* by the hand, and said, Good-by to you; on which he leaped with the utmost violence from the ladder, and the rope breaking, he fell to the ground. He immediately leaped up and loosened the rope from about his neck, and complained of the badness of it. Another rope being brought, and some time being spent in praying, he again went up the ladder, and required Mr. *Henry* and the Rev. Mr. *Benton*, to come and pray by him. Having prayed a considerable time, he drew down his cap, having previously told the executioner he would throw down his hat as a signal when to be turned off; but after having prayed for some time he pulled up his cap again. He prayed with the most fervent devotion, repeating the prayers aloud, and frequently sending forth such heavy sighs, as would penetrate the most obdurate heart with feelings of compassion. He remained near an hour on the ladder, during which

which time Mr. Henry and Mr. Benton alternately went to him. He drew down his cap, and signified his intention of making the signal to be turned off; he drew up the cap again, and requested Mr. Henry to come and pray with him. He held his (Mr. Henry's) hand grasped within his own, and in the latter moments of his affliction he prayed with great marks of contrition and devotion. The dusk of evening being set on, he was launched into eternity. From the inattention of the hangman in tying the rope too long, his toes touched the ground, until the humanity of a spectator raised up the body while the hangman shortened the rope. His body, after hanging upwards of forty minutes, was cut down, and carried to his house at Turlough, and interred the next morning in the churchyard of Turlough.

THE END.

and of evening being set on, he was launched into eternity. From the position of the hangman in tying the rope too long, his toes touched the ground, until the humanity of a spectator raised up the body while the hangman shortened the rope. His body, after hanging upwards of forty minutes, was cut down, and interred in the church-yard of Tinsburgh.

